THE INDIAN LAW REPORTS.

MADRAS SERIES,

CONTAINING

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AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THAT COURT.

REPORTED BY

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THE

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APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Wallis and Mr. Justice Sankaran-Nair.

RANDUPURAYIL KUNHISORE, KARNAVAN AND MANAGER OF HIS TARWARD (PLAINTIFF), APPELLANT,

v.

NEROTH KUNHI KANNAN AND OTHERS (DEFENDANTS), RESPONDENTS.*

1908. January 9. February 4.

Malabar Compensation for Tenants' Improvements Acts I of 1887 *and* 1900—*Contracts entered into before 1st January* 1886, *effect of.*

Section 7 of the Malabar Compensation for Tenants' Improvements Act of 1887, which is reproduced as section 19 of the Act of 1900, does not affect the validity of contracts made prior to 1st January 1886, whether the improvement was made before or after the coming into operation of the Act of 1887.

Malikan v. *Shankunni* (1890) I.L.R., 13 Mad., 502, dissented from.

SECOND appeal from the decision of A. V. Venkataramana Pai, District Judge of North Malabar, in Appeal Suit No. 39 of 1905, presented against the decree of T. V. Venkateswara Aiyar, District Munsif of Kuttuparamba, in Original Suit No. 534 of 1904.

This suit was brought to recover, with arrears of rent, and future rent a paramba leased to the first defendant by the plaintiff's late Karnavan under a registered deed dated 14th October 1881. The second defendant had purchased first defendant's right at Court sale subject to a mortgage for Rs. 400. The registered deed contained certain stipulations regarding the value of improvements.

* Second Appeal No. 1109 of 1905.

The second defendant claimed the full value of improvements made by him subsequent to 1887 while the plaintiff contended that the former was entitled to the value of improvements according to the terms of the lease deed. The Munsif held that as the improvements were effected after 1887, the second defendant was not bound by the terms of the lease and decreed the full value according to the provisions of the Act. His decree was confirmed on appeal.

Plaintiff appealed to the High Court and the case was remanded for findings on the value of improvements. On receipt of the findings, the case came on for hearing before (Sir Arnold White, C.J., and Miller, J.) who made the following Order of Reference to the Full Bench.

The effect of the decision in *Viru Mammad* v. *Krishnan*(1) appears to us to be that the rate of compensation to which a tenant is entitled for improvements effected after 7th January 1887—the date of the coming into operation of The Malabar Compensation for Tenants' Improvements Act, 1887—is governed by the Act notwithstanding that a special contract was subsisting with reference to the rate of compensation at the date the Act came into operation. We find a difficulty in following this decision, and it appears to be inconsistent with the observations of the Full Bench in *Kerala Varmah Valia Rajah* v. *Ramunni*(2). We accordingly refer the following question to a Full Bench :—

In the case of a contract made prior to 1st January 1886 is the rate of compensation which a tenant is entitled to receive governed by the terms of the contract or by the provisions of The Malabar Compensation for Tenants' Improvements Acts of 1887 and 1900 ?

The case came on for hearing in due course before the Full Bench constituted as above.

V. Ryru Nambiar for appellant.

C. Madhavan Nair for fifth respondent.

The Court expressed the following

OPINION.—We are of opinion that section 7 of the Act of 1887, which is reproduced as section 19 of the Act of 1900, precludes parties from contracting themselves out of the Act by any contract made after 1st January 1886, but that it does not affect the validity of contracts made prior to 1st January 1886, whether the improvements were made before or after the coming into operation of the Act of 1887. As regards *Viru Mammad* v. *Krishnan*(1) a reference to the printed papers shows that the contracts of the defendants other than the sixth defendant were, in fact, made after 1st January 1886. We are unable to agree with the decision in *Malikan* v. *Shankunni*(2).

(1) (1898) I.L.R., 21 Mad., 149. (2) (1893) 3 M.L.J., 52.

Our answer to the question which has been referred to us is that in the case of a contract made prior to 1st January 1886, the rate of compensation is governed by the terms of the contract.

APPELLATE CRIMINAL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

1908. October 6, 9, 12, 16, 19, 20. November 4.

V. O. CHIDAMBARAM PILLAI (SECOND PRISONER), APPELLANT IN CRIMINAL APPEAL No. 491 OF 1908.

SUBRAMANIA SIVA (FIRST PRISONER), APPELLANT IN CRIMINAL APPEAL No. 503 OF 1908,

v.

EMPEROR, RESPONDENT IN BOTH.*

Criminal Procedure Code—Act V of 1898, ss. 196, 4 (b), 200, 225, 287, 537—Indian Penal Code—Act XLV of 1860, ss. 109, 114, 124 (a)—Evidence Act I of 1872, s. 14 (a)—Sanction under s. 196, Criminal Procedure Code, form of—Sanction to prosecute under s. 124 (a) will authorise prosecution under ss. 124 (a) and 114, Indian Penal Code—Complaint by Police officer not a police report under s. 4 (b), Criminal Procedure Code—Defects in complaint cured under s. 537, Criminal Procedure Code—Irregular order to investigate after cognisance under s. 200, Criminal Procedure Code—Defective charge under s. 124 (a), Indian Penal Code, curable under ss. 537 and 225, Criminal Procedure Code—Intention of speaker may be gathered from speeches other than those charged—Admissibility of speeches to prove object of conspiracy—Statement forwarded by accused admissible under s. 287, Criminal Procedure Code—Requisites of offence under s. 124 (a), Indian Penal Code.

Section 196 of the Criminal Procedure Code only requires that the complaint should be made upon authority from the Local Government and not that the

(1) (1898) I.L.R., 21 Mad., 149. (2) (1890) I.L.R., 13 Mad., 502.

* Criminal Appeals Nos. 491 and 503 of 1908.

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actual complaint must be expressly authorised by the Local Government. The Court has only to see whether the complaint is made by order or under authority of Government.

Queen-Empress v. *Bal Gangadhar Tilak*, (1898) I.L.R., 22 Bom., 122, referred to.

Where a Police officer files a complaint in a non-cognisable case or regarding an offence of which it is not his duty to report, such complaint is a complaint within section 4 (*b*) of the Criminal Procedure Code and is not a police report.

King-Emperor v. *Sada*, (1902) I.L.R., 26 Bom., 150, referred to.

A complaint is not defective because it did not set out the speeches or alleged seditious words which form the subject matter of the subsequent charge. Even if such omission is a defect, it is an irregularity which will be cured by section 537 (*a*) unless it has occasioned a failure of justice.

When a magistrate, after duly taking cognisance of a case under section 200, Criminal Procedure Code, makes an order to investigate not authorised by law, such unauthorised order does not vitiate subsequent proceedings.

A charge of an offence under section 124 (*a*) is defective if it does not set out the speeches alleged to be seditious; but such defect does not, under sections 537 and 225 of the Code of Criminal Procedure, vitiate the proceedings and any objection on the ground of such defect ought to be taken as early as possible.

Where certain speeches form the subject matter of a charge for sedition and when such speeches form part of a series of speeches or lectures on one topic, delivered within a short period of time, any of such speeches or lectures will be admissible, under section 14 of the Evidence Act, as evidence to prove the intention of the speaker in respect of the speeches which form the subject of the charge.

Queen-Empress v. *Jogendra Chunder Bose*, (1892) I.L.R., 19 Calc., 35, referred to.

Emperor v. *Phanendra Nath Mitter*, (1908) I.L.R., 35 Calc., 945, referred to.

The offence of abetting under section 109, Indian Penal Code, plus presence of the abettor on the occasion of the crime abetted is, constructively, under section 114, the offence abetted; and a sanction under section 196 of the Criminal Procedure Code, to prosecute for an offence under section 124 (*a*), will authorise a complaint under section 124 (*a*) and section 114.

Where an agreement exists between two parties, in pursuance of which speeches are delivered by them, such speeches are admissible to prove the object of the agreement.

APPEAL from convictions and sentences passed by A. F. Pinhey, Additional Sessions Judge of the Tinnevelly Division, in Calendar Case No. 1 of 1908.

The facts which led to this prosecution are thus stated in the judgment of the Sessions Court.

The two accused Subramania Siva and V. O. Chidambaram Pillai have been committed by the Additional District Magistrate, Tinnevelly, on the following charges :—

Subramania Siva on four charges of sedition (Section 124A, Indian Penal Code), the seditious matter being contained in four

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public speeches delivered at Tuticorin on 23rd, 25th and 26th February and on the 5th March 1908.

V. O. Chidambaram Pillai on a single charge of abetment of the offences punishable under sections 124A and 109, Indian Penal Code.

Before dealing with what I may call the issues in the case, it is advisable to give a short history of events in Tuticorin and Tinnevelly during February and March. The first accused, whose original name was Subramania Iyer, is a relation of the Palamcottah Inspector of Police, prosecution witness No. 7, and a native of Batlagundu in the Madura district. In 1902 he seems to have obtained, temporarily, the appointment of muchi in the office of the Special Assistant Superintendent of Police, Sivakasi. Later, it would seem, he went to Travancore, and after completing his education there, assumed the garb of a sanyasi, called himself Subramania Siva, and started to tramp the country as an itinerant preacher. His letter, exhibit XVIII, written from Travancore in 1905 to his college friend Chinnaswami Pillai, defence witness No. 22, would seem to show that at that date he did not concern himself with politics; but from the evidence of defence witnesses Nos. 1—3 it would seem that soon afterwards he took up that subject also. In January 1908 he was forming a Sabha at Ambasamudram under the auspices of defence witness No. 2 and other vakils, and lectured on Swadeshi and boycott among other subjects. On 3rd February 1908, he arrived at Tuticorin and at once gave a series of lectures extending over a week at the invitation of "The Young Men's Patriotic Association." The police, as in duty bound, watched him from the first and took notes of his speeches, but until 19th February 1908, when the first glaringly seditious speech was made, there was no thought of taking action against him, and the earlier notes are lost though the reports based on them are said to be available.

At Tuticorin the second accused is a man of influence and position. He was formerly a second-grade vakil but gave up his practice to become Assistant Secretary (afterwards Superintendent also) of the new Swadeshi Steam Navigation Company, which started in Tuticorin in October 1906. He seems to have been an ardent believer in the doctrine of Swadeshi and boycott and apparently the real controlling force in the affairs of the new Company. According to the prosecution case, the second accused,

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recognising the powers of the first accused as an orator, quickly got hold of him, invited him to his house and commenced with him a campaign of seditious speeches which so inflamed the minds of the populace against the Government authorities and the European community, that they caused the mill hands of the Coral Mills Company to go on strike on 27th February 1908 and ultimately caused the riots at Tuticorin and Tinnevelly on the 13th March directly the speakers were arrested.

The speeches were delivered almost daily from the 3rd February to the 11th March. Most of the speeches were delivered on the beach at Tuticorin. Till 19th February 1908 they were comparatively harmless. On 22nd, 23rd and 25th February the speeches were delivered at Hindu temples. On 27th February, in consequence of the strike of the mill hands, public meetings were forbidden by the Divisional Magistrate, Mr. Bracken, who considered that serious mischief would probably ensue if the speeches were continued to idle mill hands who had already been induced to strike without any real grievance of their own. On 28th and 29th February private meetings were accordingly held at a private Bandy Petta and at the Dharmasangam—an old weaving factory belonging to the second accused and others—and a notice was sent to the police to say that their attendance was forbidden.

On 29th February the District Magistrate arrived from Tinnevelly, and after a walk through the town, during which he found it quiet, held a conference of the leading town's people including the second accused. The result was that, deceived by the apparent peaceful condition of affairs during his short visit, he directed cancellation of the order forbidding meetings. The public meetings accordingly were recommenced on 1st March 1908. There was little change in the tone of the speeches, and a procession was announced for the 9th March in honour of B. C. Pal who was to be released from gaol on that day. To prevent the breach of the peace the procession was forbidden, and notices were served on the two accused (and also on another named Padmanabha Aiyangar who had recently joined in the campaign) calling them into Tinnevelly on the 9th March to answer charges under section 108, Criminal Procedure Code. On 9th March the accused being absent, no procession was held at Tuticorin ; but a procession, originally fixed for the 14th, was held that night at Tinnevelly

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after the Court was closed, and speeches were again made by both accused in the bed of the Tambraparni river opposite the Court house. On the 10th morning the two accused and Padmanabha Aiyangar were back again in Tuticorin and the prohibited procession with B. C. Pal's photo came off in the forenoon, the three men riding in a phaeton with the photo. Catching the 12-30 train they were back in Tinnevelly in time to attend the District Magistrate's Court the same afternoon. On the 11th evening the two accused went straight from the District Magistrate's Court to the river bed in front of it and again addressed a meeting ; while the District Magistrate, who had found "Bande Matharam" inscribed on the walls and punkahs of his Court, was followed to his house by a mob shouting the same war-cry. On the 12th, the District Magistrate considering that the two accused could no longer with safety be allowed to be at large, caused to be initiated fresh proceedings under section 107, Criminal Procedure Code, arrested the three men, and had them confined. This proceeding, imperative as it seemed at the time, was held to be illegal by the High Court at a subsequent date. On the 13th March the shops in Tuticorin *never opened*. At Tinnevelly before noon, but after the arrival of the Tuticorin train, the bazaars were also closed and a riot of a serious character occurred. Every public building (except the Sub-Registrar's office) was attacked and fired, including the Police station, Municipal office, Additional District Munsif's Court, etc., and the riot was only quelled by calling out the Reserve Police and using fire arms. All the time Tuticorin remained quiet but with *bazaars closed*. In the evening a prohibited meeting was held at the Bandy Petta which the Divisional Magistrate (now Mr. Ashe who had relieved Mr. Bracken) had to disperse also with an armed force.

On 25th March 1908 a High Court order directing the release of the speakers on bail was received, but on 23rd March 1908 the long awaited order of Government had been received authorising the filing of complaints under section 124A and other sections. The accused were accordingly rearrested the moment they came out of the Palamcottah gaol.

The present charges against the first accused have reference to his speeches at Tuticorin on the 23rd February, 25th February and the 5th March. The speech of the 23rd February was delivered at the usual hour (about 5 or 5-30 P.M.) at the Uchini

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Maha Kali Amman Koil. The second accused was present and also made a speech.

The speech of the first accused on 25th February was delivered at Karuppaswami Koil. The second accused was present but did not speak. The speech of the first accused on 5th March was delivered on the beach. The second accused was not present.

The questions for decisions are exceedingly simple. Did the first accused utter the words imputed to him, and if so, are they *seditious*, as defined in section 124A, Indian Penal Code.

The Sessions Judge then considered the evidence in the case and found both the accused guilty as charged. The first accused was sentenced to transportation for 10 years and the second accused to transportation for life.

The accused preferred appeals to the High Court.

Cowdell for appellant in Criminal Appeal No. 503 of 1908.

R. Sadagopachariar, *V. Venkatachariar* and *C. Narasimhachariar* for appellant in Criminal Appeal No. 491 of 1908.

Richmond for the Crown in support of the convictions in both the above appeals.

JUDGMENT IN CRIMINAL APPEAL No. 503 OF 1908.—This is an appeal by one Subramania Siva against his conviction by the Additional Sessions Judge of Tinnevelly for offences under section 124A, Indian Penal Code, and against the sentence of 10 years' transportation. Subramania Siva was tried together with one V. O. Chidambaram Pillai who was charged with the abetment of the offences charged against Subramania Siva, the first accused.

Several points of law were taken on behalf of the first accused by his Counsel, Mr. Cowdell, in connection with the institution of the criminal proceedings.

The first point raised was that the order of Government on which the proceedings were instituted did not satisfy the requirements of section 196 of the Code of Criminal Procedure. This section enacts: "No Court shall take cognizance of any offence punishable under chapter VI of the Indian Penal Code (except section 127), or punishable under section 108A, or section 153A, or section 294A, or section 505 of the same Code, unless upon complaint made by order of, or under authority from, the Governor-General in Council, the local Government, or some officer empowered by the Governor-General in Council in this behalf."

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The order of Government directing the prosecution is dated the 22nd March 1908 (exhibit A). The substance of this order was telegraphed in cypher by Government to the District Magistrate of Tinnevelly on the 23rd March 1908 (exhibit I).

On the morning of the 23rd March 1908, the District Magistrate gave to the Prosecuting Inspector of Police an extract from this telegram and orally instructed him to file a complaint. The complaint against the first accused (exhibit U) was filed the same day along with exhibit I. Exhibit A is in these terms:—"Under the provisions of section 196 of the Criminal Procedure Code, the Madras Government authorises the institution of criminal proceedings against Chidambaram Pillai, Subramania Siva and Padmanabha Aiyangar under sections 124A, 153A and 505 of the Indian Penal Code in respect of speeches delivered by them at Tuticorin and Tinnevelly in the months of February and March 1908. The Prosecuting Inspector, Tinnevelly, is directed to prefer without delay complaints of offences under the above sections before the District Magistrate, Tinnevelly, against the abovesaid three individuals."

What section 196, Criminal Procedure Code, requires is that the complaint should be made upon authority from the local Government. The order in this case (exhibit A) states the sections under which the institution of the criminal proceedings is authorised, and, in general terms, the times when the speeches, in respect of which the proceedings were authorised, were delivered. In our opinion, there is nothing in the section to warrant the construction that the actual complaint must be expressly authorised by the local Government. In *Queen-Empress* v. *Bal Gangadhar Tilak*(1), the order was more general in its terms than the order in the present case, and Mr. Justice Strachey held that the requirements of section 196, Criminal Procedure Code, were satisfied. He pointed out that the section did not prescribe any particular form of order and did not even require the order to be in writing; and the same view was taken by the Full Bench of the Bombay High Court on an application for leave to appeal to the Privy Council (see page 150 of the same case). In *Apurba Krishna Bose* v. *Emperor*(2), the authority given by the Government would seem to have been quite as general in its terms as the authority given in

(1) (1898) I.L.R., 22 Bom., 122 at p. 150. (2) (1908) 7 Calc. L.J., 49.

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the present case, and the Calcutta High Court was of opinion that the authority was sufficient. The only question which the Court has to consider with reference to section 196, Criminal Procedure Code, is—"Is the complaint which I am asked to entertain, a complaint made by order or under authority of Government?" The answer in the present case is necessarily in the affirmative.

The next point taken on behalf of the first accused was that there had been no legal "complaint" at all in this case. The complaint, exhibit U, was put in by the Prosecuting Inspector of Police for the Tinnevelly district. "Complaint" is defined in section 4 (*h*) of the Code of Criminal Procedure as not including the report of a police-officer. Mr. Cowdell's point was that exhibit U was a 'police report' and not a 'complaint.' A complaint is none the less a complaint because it is put in by a police-officer. In our opinion "the report of a police-officer" must be some statement made in connection with, or at least under colour of, the duty of the maker as a police-officer. It is not the duty of a Prosecuting Inspector to make reports of offences to Magistrates under section 124A of the Indian Penal Code. In the present case the Government directed the Prosecuting Inspector to make a complaint, just as in *Queen-Empress* v. *Bal Gangadhar Tilak*(1), it directed the "Oriental Translator to Government" to make the complaint. His complaint is the statement of the officer of Government obeying the order of Government. In *King-Emperor* v. *Sada*(2), it was held that, where a police-officer files a formal complaint in a non-cognizable case, he cannot be said to make a report and his complaint falls within the definition of "complaint" in section 4 (*h*) of the Criminal Procedure Code, 1898.

We are also of opinion that there was no informality in the complaint on the ground that it did not set out the speeches or the alleged seditious words which were the subject matter of the subsequent charge. In *Queen-Empress* v. *Bal Gangadhar Tilak*(1), there is a dictum to the effect that the complaint should contain the article complained of to give information to the accused of the charge against him. With great respect to the learned Judges who composed the Full Bench in that case we think that dictum is too widely expressed and goes beyond what the law requires. We agree with the Additional Sessions Judge

(1) (1898) I.L.R., 22 Bom., 122 at p. 150. (2) (1902) I.L.R., 26 Bom., 150.

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that the complaint is not intended to give information to the accused. It is not suggested that the summons or warrant issued to secure the attendance of the accused must set out all the facts on which he is to be charged, and, if not they, why the complaint? Even if the complaint were defective in that it did not set out the dates of the speeches and the nature of the alleged seditious matter, this is at most an irregularity within section 537 (*a*) of the Code of Criminal Procedure, and, as a Court of Appeal, we cannot reverse the conviction on this ground unless the irregularity has in fact occasioned a failure of justice. It is impossible to say it has done so. The accused, before he was committed, knew all the facts on which the prosecution relied, and it has not been suggested that he had not time after these facts were all disclosed to prepare his defence.

The Magistrate took cognizance of the complaint under section 200 of the Code of Criminal Procedure. Subsequently he made an order (exhibit II in Criminal Appeal No. 492 of 1908 on the file of the High Court) directing the Prosecuting Inspector to investigate the complaint. The Magistrate having duly taken cognizance of the case, the order to the Prosecuting Inspector to investigate the complaint, assuming, for the sake of argument, the Magistrate was not empowered by law to make the order, did not affect the validity of the subsequent proceedings [see section 529 (*b*) of the Code of Criminal Procedure].

The points with which we have so far dealt have reference to the preliminary stages of the case. With reference to the trial in the Sessions Court Mr. Cowdell raised the point that the 'charge' was insufficient on the ground that it did not fulfil the requirements of section 222 of the Code of Criminal Procedure. The charge is in these terms:—

First.—That you, on or about the 23rd day of February 1908 at Tuticorin, in a public speech, did bring or attempt to bring into hatred and contempt or excite or attempt to excite disaffection towards the Government established by law in British India, and thereby committed an offence punishable under section 124A of the Indian Penal Code, and within the cognizance of the Court of Sessions.

Second.—That you, on or about the 25th day of February 1908 at Tuticorin, in a public speech, did bring or attempt to bring into hatred or contempt or excite or attempt to excite

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disaffection towards the Government established by law in British India, and thereby committed an offence punishable under section 124A of the Indian Penal Code, and within the cognizance of the Court of Sessions.

Third.—That you, on or about the 5th day of March 1908 at Tuticorin, in a public speech, did bring or attempt to bring into hatred or contempt or excite or attempt to excite disaffection towards the Government established by law in British India, and thereby committed an offence punishable under section 124A of the Indian Penal Code, and within the cognizance of the Court of Sessions.

The charge, no doubt, contains particulars as to the time when, and the places at which, the alleged seditious speeches were delivered. But we think it was defective in that it did not set out the speeches or the passages in the speeches which the prosecution alleged to be seditious. It is not necessary for us to consider whether, under the law of England, this charge as an indictment would be good. The Indian legislature, in addition to the general provision contained in section 537, Criminal Procedure Code, has expressly provided that formal defects shall not in themselves vitiate a charge. Section 225, Criminal Procedure Code, enacts: "No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice." The principle of illustration (*b*) to this section seems to us to be applicable to the present case.

The first accused was represented by Counsel before the Committing Magistrate, and no objection was taken to the form of the charge as framed by him; and no objection was taken before the Sessions Court until Mr. Cowdell came to sum up the case for the defence. In considering this point, regard must be had to the fact that the objection was not raised till a very late stage in the proceedings. See explanation to section 537, Criminal Procedure Code. The accused could have stated his objection to the form of the charge when it was read to him in the Magistrate's Court under section 210 (2) of the Code of Criminal Procedure. He did not do so. He had another opportunity when the Additional Sessions Judge called on him to plead.

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He did not avail himself of that opportunity. It was not until after he had examined all his witnesses that he complained of the form of the charge. The first accused was fully aware, from the proceedings before the Committing Magistrate, of the passages in the speeches upon which the prosecution relied as being of a seditious character. He called 25 witnesses before the Sessions Court and had full opportunity of meeting the case put forward by the prosecution. A similar objection to a charge was raised in the case of *Queen-Empress* v. *Anant Puranik*(1). The learned Judges pointed out that the accused in that case was defended by able pleaders who could have no difficulty in finding out from the committal proceedings the offence alleged against the accused and they held that he had not been prejudiced by the irregularity. Notwithstanding the omission of the particulars which, in our opinion, the charge ought to have contained, we are certainly not prepared to say that the first accused was in fact misled by the omission and that the omission has occasioned a failure of justice.

Exception was also taken to the way in which the notes of the Police officers of the speeches made by the first accused were dealt with by the Additional Sessions Judge. The notes were 'filed' and marked as exhibits in the case. No one, of course, would suggest that these notes were, in themselves, evidence. What happened at the trial was this. The Police officers using their notes for the purpose of refreshing their memory gave evidence in accordance with their notes. The learned Judge did not record the whole of this evidence but only such portions of it as the prosecution relied on. He then allowed the notes themselves to become part of the record in the case. This, it seems to us, was done quite as much in the interest of the accused as in the interest of the prosecution. The first accused has relied upon the full notes of the speeches, as he is, of course, entitled to do, as explaining and qualifying the extracts which are recorded by the Judge; and he has himself put in evidence certain notes of speeches, as taken by the police [see exhibit III (*a*) and exhibit IX]. At an early stage of the examination-in-chief of the second witness for the prosecution as appears from the learned Judge's notes—see page 6 of the printed evidence—it was agreed by both sides that the witness should read out his

(1) (1901) I.L.R., 25 Bom., 90.

notes and the notes themselves should be 'filed' to save the time and labour in recording them. At page 17 of the printed evidence, we find the following note by the learned Judge: "[*Note.*—At the request of Mr. Sadagopachari" (who appeared for the second accused) "the whole speech of 19th February 1908 is marked exhibit B1, and not merely the portion translated in the deposition]. (Similarly with regard to the other speeches exhibited as B, C, D and E series.) (The whole of these have already been read out by the witnesses though only such portions were entered in the depositions as P.P. considered material.")

The first accused was represented by Counsel at the time it was agreed that this course should be adopted. Mr. Cowdell, who came into the case at a later stage, took objection with reference to the filing of the notes of a speech made by one Gnanasigamani Mudaliar. When this objection was taken, this speech had not been proved by the oral evidence of any of the witnesses, and it could not, of course, be suggested that these notes were evidence. Mr. Cowdell's objection with regard to these particular notes is well founded. There is no note of any other objection by Mr. Cowdell. But in the argument of the appeal he stated to us that he took a general objection to the 'filing' of any of the notes of speeches. But he does not state that he took this objection until he came to sum up the case for the defence. With regard to the speeches which were proved by the oral evidence of the witnesses, we are of opinion that, in the circumstances stated, the learned Judge was right in allowing the notes of the Police officers to become part of the record in the case.

A further point raised in the appeal was that evidence which was admitted by the learned Judge of speeches by the first accused, other than the speeches which formed the subject matter of the charge, was not relevant and ought not to have been admitted. We are of opinion that where there is a series of speeches or lectures on one topic, all delivered within a short period of time, one may be considered for the purpose of throwing light on the real meaning and intent of another, and on the state of mind of the speaker with reference to the object matter of the other speeches. This principle is recognised in illustration (*e*) to section 14 of the Indian Evidence Act, and has been acted on, in cases of prosecutions for sedition in all the other High Courts in

India. Such evidence was held admissible in the case of *Queen-Empress* v. *Jogendra Chunder Bose*(1), in the case of *Emperor* v. *Phanendra Nath Mitter*(2), and in the case of *Queen-Empress* v. *Bal Gangadhar Tilak*(3). In charging the jury in that case, page 139, Mr. Justice Strachey said: "You will thus see that the whole question is one of the intention of the accused in publishing these articles. Did they intend to excite in the minds of their readers, feelings of disaffection or enmity to the Government? Or did they intend merely to excite disapprobation of certain Government measures?" It was also held admissible in the case of *Queen-Empress* v. *Amba Prasad*(4) by a Full Bench of the Allahabad High Court. In delivering the judgment of the Full Bench, Sir John Edge, on page 69, said: "The intention of a speaker, writer or publisher may be inferred from the particular speech, article or letter, or it may be proved from that speech, article or letter considered in conjunction with what such speaker, writer or publisher has said, written or published on another or other occasions." We may also refer to the judgment of the majority of the Judges sitting in the Court for the consideration of Crown cases reserved in *Rex* v. *Bond*(5).

A further point taken by Mr. Cowdell was with reference to the document marked as exhibit S. When asked, by the Committing Magistrate, if he wished to make any statement, the first accused said that he did not. The following day he made a statement to the Superintendent of the District Jail and asked that it might be placed on record. The Superintendent forwarded the statement to the Magistrate. The Magistrate sent for the first accused and examined him with reference to this statement; and on learning that he wished to 'file' it in the case, the Magistrate filed it (exhibit S).

We are of opinion that this statement in the circumstances in which it was made, is admissible as evidence under section 287 of the Code of Criminal Procedure, and is evidence of intention which is relevant to the charge under section 124A of the Indian Penal Code.

Even if we regard the statement, as Mr. Cowdell has invited us to do, as a written statement put in under section 256 of the Code

(1) (1892) I.L.R., 19 Calc., 35 at p. 46.
(2) (1908) I.L.R., 35 Calc., 945.
(3) (1898) I.L.R., 22 Bom., 112.
(4) (1898) I.L.R., 20 All., 55.
(5) (1906) 2 K.B., 389.

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of Criminal Procedure, it seems to us it is none the less admissible as evidence of intention. The statement is in the following terms:—

"1. When the Court asked me yesterday if I wished to make any statement, I did not wish to do so and accordingly said the same. To-day I wish to make a statement and accordingly make the following one.

"2. I am a sanyasi. My mission is to propagate the principles of Mukthi and also the ways to attain it. Mukthi for a soul is freedom from all foreign bondages. Mukthi for a nation is freedom from all foreign control, that is, Absolute Swaraj. Accordingly I preached to my countrymen the gospel of Swaraj and also the ways to attain it, viz., boycott—boycott of all that stands in the way of my nation's attaining Swaraj—, Passive Resistance and National Education.

"3. During the last four years I have travelled through, and propagated my mission in various places in the States of Cochin and Travancore and in the districts of Tinnevelly and Madura. Early in February this year, I went over to Tuticorin and preached my gospel to my countrymen there till the 9th March 1908 and then on the 9th and 11th March I did the same in Tinnevelly. It is sheer nonsense to say that anybody induced me to deliver lectures at Tuticorin or Tinnevelly.

"4. The so-called notes of my speeches filed by the prosecution are not true and correct but garbled and distorted They contain many passages which I never spoke. It is absurd to say that my speeches have caused discontent, disloyalty and ill-feeling towards the Government and the Europeans. Unless a man really suffers from a disease, he cannot be made by others to feel the pain of that disease. Similarly, unless there are real causes for discontent, etc., among the people, it is foolish to say that such can be spread through a man's speech.

"5. From the time when the English got the administration of the country in their hands the people of India felt discontented and dissatisfied, since the former acquired the country not as a direct conquest nor as a donation but as the result of many tricks and treacheries played by them, such as alienating Commanders from Rulers, executing false documents, committing forgeries, cheating simple-hearted men, etc. This discontent grew more and more in the hearts of the people till at last it burst into a volcano

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in 1857. At that crisis, Queen Victoria came to the front of the stage, covered the eyes of the people with the magical veil of Magna Charta and hypnotised them. Viceroys after Viceroys came to India and held out delusive hopes to the people by words, but acted otherwise.

"6. The most atrocious Arms Act was passed which deprived the natives of the soil from the free use of arms: Laws were passed in the land giving greater privileges to the Europeans than to the natives of the soil. Under the name of various taxes the life-blood of the people was sucked. Famines, plague and internal dissensions made the country their permanent home. The foremost province of the country was divided into two against the wish of the whole nation simply to 'divide and rule.' Two of the eminent sons of the country were deported for no cause whatever shown till now. Several leaders of the people were thrown into prison under false pretext of law. Armenian horrors were perpetrated, terrible riots and outrages committed, in the country. Mischievous laws and unreasonable orders were passed. Trials of criminal cases became mere farces.

"7. These inhuman and cruel measures of the Government made the people feel its absoluteness and the necessity for its change. It is but natural that the people would feel so. Great saints have said:—

'கொலைமேற் கொண்டாரிற்கொடிதே
யரசு மேற்கொண்டல்லவை செய்தொழுகும் வேந்து'

(A king doing injustice (to people in view of money) is worse than a murderer.)

'வேலொடு நின்று னிடுவென்ற தோலுங்
கோலொடு நின்றுனிரவு"

(A cruel king exacting money (tax) from people, by oppression, is like robber demanding by ill-treatment the travellers to give up property.)

"Every right-thinking man will work to put down vice and to establish virtue in its stead. Accordingly the people of India are now trying to establish, in the place of the foreign Government their Swaraj."

We have now dealt with all the points of law taken by Mr. Cowdell on behalf of the first accused.

The two main questions we have to consider in this appeal are (1) have the prosecution proved that the words which they allege

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to be seditious were in fact spoken by the first accused, and if so, (2) do the words come within the provisions of section 124A of Indian Penal Code.

Meetings were held and speeches delivered almost daily from the 3rd February to the 11th March 1908. Most of the speeches were delivered on the beach of Tuticorin. On the 22nd, 23rd and 25th February 1908, speeches were delivered at Hindu temples in Tuticorin.

The first charge is with reference to a speech alleged to have been made at a temple on the 23rd February 1908. Evidence as to this speech was given by the second witness for the prosecution, Police Inspector Jaffer Hussain, by the third witness for the prosecution, Sub-Inspector Venkatavarada Chari, and by the fourth witness for the prosecution, Head Constable Kaliyugarama Pillai. The evidence of these witnesses was recorded by the learned Judge in the manner we have described; and the notes taken by them were filed in the circumstances already stated and marked respectively exhibits B3, J and N.

The second charge is with reference to the speech alleged to have been made at another temple by the first accused on the 25th February 1908. Evidence as to this speech was given by the second witness for the prosecution. The notes were filed and marked as exhibit C.

The third charge is with reference to a speech alleged to have been made by the first accused on the 5th March 1908. Evidence as to this was given by the second witness for the prosecution and the fifth witness for the prosecution. These notes were marked respectively exhibits E1 and O1.

The following are the notes of the speech of the 23rd February 1908 as taken by the second witness for the prosecution :—"In order to obtain Swaraj they must try their best to struggle and put down oppression. When God's creation is oppressed, he himself would come forward under incarnation to put it down. The present state of affairs are in just need of an incarnation to put down high-handedness. There are now two factions. One of those that rule and the other of those that are ruled. My object is that there should be no faction and all should move harmoniously. 17,000 fire arms were stolen from Fort William. The Magistrate of Decca was shot. But the authorities failed to detect those cases. Such being the case what help the people

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of India could expect from Government? Every year the Europeans take home Indian money, leaving behind currency notes. The Indians are very kind towards their servants but the Europeans mercilessly exact work from the Indian servants. About a lakh of rupees is taken away every year to England from India for poor fund. If Indian coolies strike work for a fortnight the mills will be closed and Manchester will starve. If Indians block all gaps, the foreign Government would surely suffer. A man is blessed with all powers and if the divine gift is properly utilized, success is sure. As long as the people are perfect in health, there is no necessity for them to join foreigners. Indian coolies work in the mill for the benefit of Europeans and if they strike work the mill owners must necessarily suffer loss. By hand work the coolies get 3 or 4 rupees a month but the Europeans earn 400 or 500 by mere signing. In Bengal, the coolies of the jute mill struck work and their emoluments increased. So also in the North-West Bengal Railway. The Russian Revolution brought good to the people and so is the case throughout the world. If the workmen in the mill understand what he said and strike work for three days, European capitalists would suffer more. In Bengal, people swear upon Kali to boycott foreign goods. In 1897, when the Bengalees asked Swami Vivekananda if they could perform Sivaji festival, he told them in reply that their question was unfair. If we are afraid to perform Sivaji festival how would they shed later on. If the people were to hear what took place in the rioting of Mymensing, Jubbalpore and Comilla they would surely shudder. Without bloodshed nothing could be accomplished. It is a religious maxim. All Indians should undergo all troubles that might face them.' 'Yuganter Patrika' was brought to book four times and the editor convicted. As Japan was prepared to sacrifice 20,000 people she won victory over Russia. If five crores of Indians come to sacrifice themselves Swaraj would be theirs. In Johannesburg the Europeans pelted stones at Keir Hardie because he sympathised with the Indian people. Is this civilisation? The Indians are not weak people. So in order to obtain Swaraj they should not be afraid of anything. If all Indians whether strong or weak come forward as strong men foreign Government will collapse and Swaraj will be theirs. You must swear before Kali that you would support Swaraj."

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The following are the notes of the second witness for the prosecution of the speech of the 25th February 1908 :—" Gentlemen, I want you to cry out ' Bande Materam ' before I commence to give my lecture and also you must recite ' Allahoo Akbar ' which is a favourite cry of our Muhammadan brothers, which must find its place with our national cry.

" Gentlemen, I have already told you what the object of my speeches were and why I took all this trouble to come here and remain with you for so many days. We want to obtain Swaraj and what that Swaraj is, I have already explained to you and unless we obtain Swaraj we are not free men but a body of slaves. We must all act harmoniously and make our aim the ' Swaraj.' I being a sanyasi, must always say, something on religion—People are afraid of death. We must give up fear as there is nothing as death in this world. It is mere ' Maya' which does all this mischief and which creates all sorts of fear in human mind. If we die we are born again. The body becomes a corpse ; the ' atma ' flies away to find its place in some other frame. So, we are born again. The body, when the life goes away, becomes a corpse which is burnt, buried or thrown away in some way or other. The only reason why we are afraid of death is that we have to leave relations and friends behind. There is heaven for the good and holy. But don't suppose that the holy alone would get heaven and not the rest. Don't think that he who does charity would get heaven only. He, who dies for public good and public cause, is the first man to obtain heaven, and he is a hero and a man in its true sense. Till now we were in ' Maya.' Now we open our eyes to see Swaraj which we will get soon. The Rajangathar will, in all probability, give Swaraj, on certain conditions which would not be acceptable to us. I appeal to you and beseech you, not to accept on certain conditions, unless it is given to you free of all conditions. The mere handing over by the Englishmen of the control of the army and the finance of the country is of no use. The moderates would be very willing to accept this. If there be any conditions, it would not be considered as the real Restoration of Swaraj. When once Swaraj is restored, the country should belong to Indians without any connection between the Indians and the Englishmen. We ought not to allow them even to have their flag which can be very easily rolled and thrown into the sea. But, no ! We must not give any room to

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further interference. If we obtain Swaraj without any conditions whatever, then we will hoist the flag of Swaraj on the precipice of the Himalayas and people of other nations wishing to visit India will have to pay a tax. "

The following are the notes of the speech of the 5th March 1908 as taken by the second witness for the prosecution :— " As proposed yesterday, Somasundara Barathi is not well. So, I am obliged to speak. If I don't speak I have no rest ; to speak I feel weak. I am in a dilemma ; however, I will speak.

" We assemble here for several days. There is an advantage in it. We can discuss matters. I am able to inform publicly all that takes place all over the country. All say the strike was due to my preaching though I did not do it. I did not speak about the strike for this purpose. ' *Swarajadhulapathi*' think always of *Swarajiam* and not under *Pararajiam*. So, think that we do things in *Swarajiam*, *Swaraja*. All of us Hindus, Muhammadans, Hindus, assembled here, have determined to attain Swaraj. One man comes and tells me to say something about the mismanagement of Municipality. One man tells me here that the police want to inconvenience us by parading the police on the beach. We don't care. Think that it is to our respect. I commented upon natural law to boycott, recommended passive resistance. Am I to be blamed for it ? I came to know what the barbers think, washermen think and what police do, what vakils are boycotted. In the presence of two Inspectors I wish to say something about the strike which I did not do for the last so many days. It is known throughout India about the strike, which is stronger. Sub-Collector came and asked Chidambaram Pillai ' what about strike.' Venkatarama Aiyar, Balaji Rao, Padmanabha Aiyar sent for the strikers and asked them the cause of the strike, they said that the preaching had no effect on them. Because they were ill-treated they struck work. Yesterday some maistries were taken inside the mill and threatened, but to no effect. For the last two or three days I hear that some persons are dragging young boys, and maistries prevent. The *Rajangathar* are trying to find fault ; they are searching in every nook and corner for any disturbance, the Europeans would misrepresent matters to officials who will side them and do what they think. If we do a thing we will do it openly at the same time not against law. British India Steam Navigation Company Manickam Asari is said to collect

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boys and go to mill and maistries complain. I don't know what takes place. I say to-day, if Manickam Asari drag the boys, maistries will prevent and I don't know if there would be a disturbance for which I am not responsible. So, I inform this to the authorities in the presence of this public assembly. The Government authorities should assist the aggrieved party and not side the offending party. Public can be gained over by kind treatment and not by ill-treatment and threatenings. On the 9th March, Bepin Chandra Pal comes out of jail. He who communicated to the public what Swaraj is. What did he do? The Government sentenced him to six months' rigorous imprisonment because he refused to consent to what was dictated to him which was concoction. 'Bande Mataram' editor was arrested. Bepin Chandra Pal was summoned to give evidence against him, he refused to give evidence against him and so he got six months. We have heard of Harischandra who lost everything for the sake of truth and likewise Bepin Chandra Pal. On the 9th March he comes out of jail. So, we must join on that day into a large crowd of 35,000 and I hope all will attend. We will celebrate that memorable occasion. We must come out in procession all round the town, in the evening we must assemble on the beach and every one should try his best to speak what he likes. We should light the town. The lion of Swaraj comes out and that day will be the day when we will come out from our bonds and hoist the flag of Swaraj. All should join. If you consent to join I will celebrate, else not. I am not Lord Minto who refused to accept public opinion. That day is a Monday Karthigai and as Bepin comes out that day our paper 'Swaraj' will come out. You will think that the police will prevent us, don't think so. As the authorities have come to understand that we are peaceable people we will take the photograph of Bepin Chandra Pal. If police were to accompany us and escort us we will consider it an honour and will be glad to see them. We will open a Swadeshi Medical Hall for the sale of Ayurvedic medicines. We must select six persons, young men, true men, bold men, faithful men and we will train them to go to villages to preach to ignorant masses. We must make Tuticorin a Barisal. As regards mass meeting and the holding of meetings where the Sedition Bill is in force and if Sedition Bill comes here, we must think that we have done our work then we will go away to Tinnevelly. Two hundred and

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fifty mill hands have struck work in Madura and the mill authorities have made arrangements there that if I were to go to Madura, I must not be allowed to preach. I have received this letter from a friend. Why should the Europeans be so much against me? Why should we not assemble? It is our land, our mother land and not of foreigners. If I am stopped to preach publicly we will do so in a private building. We will prevent all officials from coming in, we will sit to eat food and discuss, so that no one would come. If Sedition Bill comes into force in all places soon we will finish our duty. We are not prepared for war, but we are ready for passive resistance. We will make all Village Munsifs and Karnams to resign, then what they would do. Barbers do not shave anti-swadesis. Two vakils went to them for a shave, they refused. If they had done what they did in Barisal it would have been much better, to shave partially and leave the men. Are barbers their slaves? Let Government sent for barbers to work for loyalists, Europeans are not very good people, if barbers (Europeans) come, we make a fun with them. If they want we will keep quiet. Government is to see to the prosperity and not to rob the people and ruin them. If other Governments who are *Rajangathars* who have the good of the people at heart, come for the rescue, we don't know we will subject ourselves to the present Government. If you are in unanimity, we will gain much and God will assist us. Several crores of pounds have been taken away by foreigners for the last 150 years and they have sucked our blood and now we in turn must earn as much as possible and send them away. You must come to a determination, you are not born to Europeans, you are not related to them, you are not their friends, so you must make up your mind not to help them in any way. By *paradesies* I don't mean paupers but foreigners who came like paupers. Everything is mud and everything will become mud. So we must look to our own prosperity. Don't become slaves for money and disgrace yourselves. Don't trouble Swadesis, don't annoy them listening to foreigners' words. Don't be selfish that you will get some money by taking coolies back to the mill. Keep your self-respect, beg from door to door for your food. The 9th March should be a memorable day and it should be celebrated with great eclat. Do you consent to this? 'Bande Mataram.' We must open an Ayurvedic Medical Hospital. Do you accept this? 'Bande Mataram.'

We will have to select six persons to go out and preach and 'Swaraj' paper will come out that day and all the public should assist. Would you do? 'Bande Mataram.'"

As regards the speeches which do not form the subject matter of the charge but which were admitted in evidence, evidence of a speech alleged to have been delivered by the first accused on the 19th February 1908 was given by the second witness for the prosecution, and his notes were marked as exhibit B. Evidence of a speech alleged to have been delivered by the first accused on the 26th February 1908 was given by the third witness for the prosecution and his notes were marked as exhibit K. Evidence of a speech alleged to have been delivered by the first accused on the 1st March 1908 was given by the second witness for the prosecution and his notes were marked as exhibit D. Evidence of a speech alleged to have been delivered by the first accused on the 4th March 1908 was given by the second, third and fifth witnesses for the prosecution and their notes were marked respectively as exhibits E, L and O. Evidence of a speech alleged to have been delivered by the first accused on the 9th March 1908 was given by the sixth witness for the prosecution and his notes were marked as exhibit Q.

The Police officers do not profess to have taken a verbatim note of the words used by the accused. The record which they made of the speeches was of the same character as the record made by the witnesses in the Trial of Edmonds and others, 1821, Reports of State Trials, New Series, vol. I, pp. 818 and 819, where the witnesses were allowed to read their notes as evidence of the speeches made. The second witness for the prosecution stated in evidence that his notes represented to the best of his ability the substance of what the speakers said. The third witness stated that he took down to the best of his ability the words actually uttered. The fifth witness stated that his notes represented what the first accused said and that everything found written there was in substance said by the first accused. The sixth witness for the prosecution speaking of his notes said: "All these words were uttered by the speaker and it is a substantially correct record of the speech." He also said: "My notes are not a verbatim report. I noted as far as I could the important utterances. I omitted things I considered unimportant." He also said:—"In my notes I used as far as possible the exact words of the speakers. . . .

The notes contain the very words uttered by Chidambaram Pillai as far as I was able to take them." The seventh witness said "The notes accurately set forth what the speakers said."

The chief witness in connection with the proof of the speeches was the second witness for the prosecution, and the learned Judge who had the opportunity of seeing his demeanour in the witness-box was satisfied that he spoke the truth. (See paragraph 15 of the judgment of the Additional Sessions Judge.) The suggestion on behalf of the defence was that his notes were not in fact made at the time they purport to have been made and that they were the outcome of consultation and collaboration between the police officers. A strong point was made of the fact that some of the notes of the second witness for the prosecution were not produced before the District Magistrate on the 9th March 1908, when security proceedings under section 108 of the Code of Criminal Procedure were instituted against the accused and others. The explanation given by the witness was that the notes had been mislaid in consequence of the confusion at the Tuticorin Police station owing to the arrival of a large number of special constables. Mr. Cowdell suggested that this explanation was not true and he referred to the evidence of the third witness for the prosecution who stated, on page 32 of the printed evidence, that the special constables arrived in three parties, the last party having arrived on the 5th March 1908. This witness stated in re-examination that the party who had arrived on the 5th March were quartered at the Police station and other places and remained there till the end of March 1908. We are certainly not prepared to say that the learned Judge was wrong in accepting the explanation of the second witness for the prosecution as to why some of these notes were not produced before the District Magistrate on the 9th March 1908. Further, as the learned Judge points out, the police reports which were marked as exhibits F, G and H series were clearly genuine, and the terms of these reports support the case for the prosecution that the notes were in fact made at the time at which they purport to have been made.

The evidence of the police witnesses is corroborated by the evidence of independent witnesses of whom the eighth prosecution witness and the eleventh prosecution witness are the most important. Their evidence is no doubt of a somewhat general

character and they do not profess to give specific dates. (The eighth prosecution witness gives no specific dates and the eleventh prosecution witness only gives one—23rd February.) With regard to the eighth prosecution witness, Mr. Sadagopachariar was able to show from his cross-examination that he was not present at any of the speeches which formed the subject-matter of the charge: and it would also seem that he was not present at the meetings of 22nd February, 1st March, and possibly 4th March, 1908. We do not think, however, that it follows that, because the words to which he speaks also, according to the evidence, occur in speeches which he did not hear that his evidence as to speeches which he says he heard is altogether untrustworthy. It seems to us extremely probable that the same set of stock phrases would have been used by the accused in more than one speech. As has been pointed out, speeches were delivered almost daily from the 3rd February to the 11th March 1908. Another point made by Mr. Sadagopachariar with reference to the police notes of speeches was that the passage, "We ought not to allow them even to have their flag which can be very easily rolled and thrown into the sea," which is to be found in exhibit C (Jaffer Hussain's notes of the speech of the first accused of 25th February 1908) finds no place in the report of that speech made by this officer, exhibit H, and that this report contains a note by the witness that there was nothing important in that speech, except building castles in the air. We have examined the original note and we are not prepared to infer—as the defence invited us to infer—that the omission of any reference to this passage in exhibit H shows that exhibit C was not a genuine note taken at the time. The learned vakil also pointed out that the reference to 50,000 foreigners in India which occurs in the notes by the second prosecution witness of a speech by the second accused (exhibit B1) is attributed by the eighth and eleventh prosecution witnesses to the first accused, and that the eleventh prosecution witness gives the date of the occasion when the reference was made. The points made by Mr. Sadagopachariar no doubt go to show that much reliance ought not to be placed on the memory of the witnesses as to the precise words used.

The police witnesses, however, were subjected to a minute and searching cross-examination at the trial before the Additional Sessions Judge. Their evidence has been scrutinised and discussed in great detail in the course of this appeal before us. After a careful consideration of the points taken on behalf of the defence with regard to this part of the case, the conclusion at which we have arrived is that the notes taken by the police-officers are substantially accurate and that the evidence given by the police witnesses may safely be acted on.

It was strongly urged that the learned Judge had not given due weight to the evidence called on behalf of the defence with reference to the words which the prosecution alleged were spoken by the first accused at the various meetings to which reference has been made. The evidence of the defence witnesses was of a negative character, to the effect that, they did not hear any seditious language used at the speeches at which they were present. None of the witnesses profess to have made notes of the speeches which they heard. After weighing the evidence on one side and on the other we are of opinion that the evidence of the witnesses called for the prosecution who speak to notes made at the time is not displaced or shaken by the general evidence given by the defence witnesses. We think also that the observation of the learned Judge that the witnesses called on behalf of the defence were interested in, or partisans of, the accused is borne out by the evidence. We are of opinion that the speeches containing the passages, which the prosecution alleges are of a seditious character, were in fact made by the first accused.

With regard to the question whether the words used by the first accused in his speech of 23rd February 1908 come within the provisions of section 124-A, Indian Penal Code, we are of opinion that in making the speech the first accused attempted to bring into hatred or contempt or to excite disaffection towards the Government, and that the speech was seditious.

The burden of the speech of 23rd February 1908 was "the way to obtain *swaraj*". There has been considerable discussion as to the meaning of this word. We have been referred to the case of *Beni Bhushan Roy* v. *Emperor*(1). There, the learned Judges express the opinion that the term does not necessarily mean government of the country to the exclusion of the present Government, but that its ordinary acceptance is "home rule" under the Government. The Judges point out

(1) (1907) I.L.R., 34 Calc., 991.

that the vernacular word used, if literally translated, would mean "self-government" but that self-government would not necessarily mean the exclusion of the present Government or independence. The word is, no doubt, used in different senses, and the sense in which a speaker employs it must be judged mainly by the context of the speech in which the word is used. We do not think it can be said that there is any ambiguity as to the meaning of this word as used by the first accused. In paragraph 2 of his own statement he defined the gospel which he preached as a gospel of "Absolute swaraj."

The thirty-sixth witness for the defence, a correspondent to several important newspapers, stated in examination-in-chief that the swaraj which the first accused inculcated was a free and independent swaraj, independent of British Government, which they were to obtain by the Boycott and Panchayat system. The witness added that he did not hear the first accused advocating the use of force. In cross-examination he said: "He (the first accused) wanted India to have complete independence, something more liberal than the colonies . . . . The greater privilege would be self-government . . . . The Viceroy and Governor to be Indians without any connection with England. It would amount to forming a sort of republic. That is how I understood it."

The passages in the speech of 23rd February 1908 which the prosecution alleges were seditious are set out in the evidence of the second prosecution witness. The reference to 'swaraj' is, in our opinion, to swaraj in the sense in which the accused used the expression in his own statement, viz., absolute independence, and the reference to putting down oppression suggests a resort to physical force. Then we have the phrase "When God's creation is oppressed, He Himself will come forward under some incarnation to put it down." The point of the allusions to 17,000 guns being stolen from Fort William and the shooting of the Magistrate of Dacca would seem to be that these crimes were never detected. Then we have the passage "Without bloodshed, nothing could be accomplished." We cannot read the passages with reference to the sacrifices made by Japan in the war with Russia, in spite of the ingenious attempts made by counsel to place an innocent interpretation on them, in any other sense than as an incitement to revolt. The phrase "If all Indians, whether strong or weak,

come forward as strong men, foreign Government will collapse and Swaraj will be theirs" is an appeal to his audience to replace the foreign Government by "Swaraj."

The first accused is, no doubt, entitled to ask that the question whether the language used by him in any speech is seditious, should be considered with reference to the speech as a whole and not with reference to isolated passages taken apart from their context. But reading the notes of the speech of 23rd February 1908 as a whole, it seems to us that, the speech not only advocates 'Swaraj' which means the exclusion of the present Government, but that it urges, if necessary, the use of force in order that that end may be attained. And we have no doubt that it was in this sense that the word was understood by the audience to whom the speech was addressed.

The general tenor of the speech of 25th February 1908, according to the notes of the prosecution second witness is much the same as that of the speech of 23rd February 1908. We find a passage, "He who dies for the public good and in the public cause is the first man to obtain heaven . . . . When once 'Swaraj' is restored, the country should belong to Indians without any connection between the Indians and Englishmen. We ought not to allow them even to have their flags which can be easily rolled and thrown into the sea. . . . . If we obtain Swaraj without any condition whatever, then we will hoist the flag of 'Swaraj' on the precipice of the Himalayas and people of other nations wishing to visit India will have to pay a tax." (We have pointed out that the reference to rolling the flags and throwing them into the sea does not appear in the report of this witness, exhibit H.) In the speech of 5th March 1908, he referred to B. C. Pal as 'the lion of Swaraj' and said that on the day of his release "We will come out from our bonds and hoist the flag of Swaraj." He also said "We must make Tuticorin a Barisal. . . . . It is our land, our mother-land and not of foreigners. . . . . We are not prepared for war, but we are ready for passive resistance. . . . . If other Governments who are Rajangathars who have the good of the people at heart, come to the rescue, we do not know we will subject ourselves to the present Government. . . . . Several crores of pounds have been taken away by foreigners for the last 150 years and they have sucked our blood and now we in turn must earn as

much as possible and send them away." Earlier in the speech he said: "We must select six persons, young men, true men, bold men, faithful men and we will train them to go to villages to preach to ignorant masses."

With regard to these speeches (25th February and 5th March 1908) we are of opinion that they also fall within the provisions of section 124A, Indian Penal Code, and that they were seditious. We do not think it necessary to discuss in detail the language of the speeches which were put in evidence but which do not form the subject-matter of the charge. It is sufficient to say that in our opinion the language employed in those speeches indicates that the intention of the speaker was to bring into hatred or contempt, or to excite disaffection towards, the Government. In connection with section 124A, Indian Penal Code, Mr. Mayne observes (Criminal Law of India, III edition, paragraph 295, page 522): "In estimating the natural consequences which will flow from particular language, all the surrounding circumstances of the case are material, the excited state of public feeling, the ignorant or hostile character of the persons addressed, the critical condition of affairs, and the influence of the speaker." There is much force in the observation of the Additional Sessions Judge that "to the mind of the average mufussil cooly there is no distinction between official and non-official foreigners. The non-officials are to them merely the kinsmen of the officials and the departure of the one at once involves the departure of the other."

We do not of course lose sight of the fact that some of the speeches which have been put in evidence dealt largely with the strike at the Coral Mills. A portion of the speech of 23rd February 1908 is in fact an incitement to the mill hands to strike. Other passages in the speeches are devoted to the question of 'boycott.' It is scarcely necessary to say that language advising a strike of workmen, or the boycott of foreign goods, is not in itself seditious, however misguided or mischievous such advice may be. We also do not lose sight of the fact that the change of demeanour among the lower classes in Tuticorin to which the witnesses for the prosecution speak may in a measure be due to the feelings of discontent with regard to their wages and treatment which had been excited among the workmen by the speeches of the accused and others, so far as we can judge, without reasonable cause. We say "so far as we can judge without reasonable

cause," because there is no evidence on which we can rely that the workmen were underpaid or ill-treated and because workmen who struck for the first time on the 27th February 1908, and afterwards went back to work at a slightly increased wage, struck for a second time on the 13th March 1908 and afterwards returned to work at their original wages. Mr. Andrew Harvey, head of the Coral Mills at Tuticorin, stated in his evidence that prior to the strike on the 27th February 1908 he had not heard any complaints from the mill hands to indicate that they were discontented in any way, that writers were sent to find out from the men what their grievances were and that in consequence of their reply an increase of the wages was given and they returned to work on the 7th March, that they continued to work till the 13th March (the day of the riots at Tinnevelly and Tuticorin) and that they left work on that day and that they started work again on the 20th March 1908 on the same pay as they originally got, and not on the increased scale of 7th March, and that after their return they were perfectly contented. The twenty-eighth witness for the defence says that having gone back to work on 7th March he was told to sign an agreement on the old scale and that he refused. In the face of Mr. Harvey's evidence we do not believe this witness.

There was evidence, which we see no reason for not accepting, of a marked change in the demeanour of the people after the speeches made by the first and second accused although, as we have pointed out, this may in a large measure be attributed to the state of feeling in connection with the strike.

As regards Tuticorin, the second witness for the prosecution said: "After the speeches, I noted a change in the conduct of the people, *i.e.*, there was lawlessness amongst them, they were previously law abiding. They commenced to disobey the orders of public servants. I used to hear shouts of 'Bande Mataram' regardless of time and place. They commenced to shout 'Bande Mataram' in the presence of Europeans. They commenced collecting in small crowds and going to the houses of Europeans and sometimes threw stones."

In cross-examination, this witness said that after the strike on the 27th February 1908 the people began to disobey the police and that they began to crowd and refused to disperse when ordered to do so.

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The third prosecution witness said: "Before the speeches the town was quiet and law abiding. After the speeches commenced I noticed a difference. The people of the town became more and more lawless. I mean the people in general, *i.e.*, the masses."

The fourteenth witness for the prosecution, the Sub-Magistrate said: "After the speeches I heard one evening as I was returning from my office to my house a crowd of about 100 rowdies crying aloud 'Bande Mataram, let Swadeshi prosper, let the *thalis* of the Englishmen's wives be torn off (*i.e.*, let them become widows), hack to pieces the white men, the sons of harlots.' This I heard in the first week of March. No acts had been done by Europeans to provoke such utterances. It was unprovoked so far as they were concerned . . . . I noticed a change in the attitude of the people after the speeches began. When I first took charge people were friendly and respectful to the authorities. After the speeches they became contemptuous of the authorities."

The fifteenth witness for the prosecution, Mr. Chapman, Agent of British India Steam Navigation Company, Tuticorin, said:—"Before I went on leave, the native population of Tuticorin were quiet and friendly. On my return, I noticed a great difference. They were not at all friendly. They shouted 'Bande Mataram' and Tamil words that I don't understand. It became so bad that I could not allow my wife and children to drive through the native town. We had to restrict ourselves to the beach road . . . . The hostility of the people became most marked after the 1st March 1908."

The nineteenth witness for the prosecution, Mr. Rhenius, an Assistant Commissioner of Salt and Abkári, said: "The first week in March, I was grossly insulted by a knot of people standing in front of my window at which I was standing. They shouted '*Aday Vellaikkarur Kettupporar*' you, there, whitemen will be wiped out The word '*aday*' is a most insulting form of address from a cooly. On one occasion as I was driving to the Salt factory at Arasadi I passed along the Great Cotton Road, I was shouted at by a group of people who shouted and jeered at me. On these occasions I had done nothing to provoke any one. I was particularly careful to avoid anything of the sort."

The twenty-first witness for the prosecution, a second-grade pleader said: "Before February and March, people were well disposed and friendly towards Europeans and authorities of

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Government. After the speeches the people showed signs of dislike, hatred and disloyalty. I move freely among the people. I gathered my impressions from conversations with different people. Crowds going to hear the preaching shouted 'Bande Mataram, let Swadeshi prosper and foreigners be damned.' These cries were uttered especially by the lower orders."

It was suggested on behalf of the defence "Let foreigners be damned" was not an accurate translation of the words which the witness alleged he had heard shouted. These words were given in the vernacular before the Committing Magistrate and it would seem that the more correct translation of the expression "Let foreigners be damned" would be "Let foreigners die or perish."

Speaking of Tinnevelly, the first Court-witness, the Deputy Magistrate, said that on the 13th March, the day of the riots, one of the rioters cried out to the reserved policemen: "Why do you all stand there? Come away to us. We will shoot white-men."

The evidence as to the events immediately preceding the riots is summarised by the Additional Sessions Judge in paragraph 13 of his judgment.

With reference to the riot at Tuticorin, the fourteenth witness for the prosecution, the Sub-Magistrate gave evidence as follows:—"On 13th March all the shops were closed, there was no food for the punitive police and other needy people in the town. I begged one and all of the shop-keepers to open the shops. Except Shanar merchants others refused to comply with my request. The Shanar merchants also were afraid to open the shops for fear of the violence of the mob. I had to sit with the merchants for three hours with two armed constables and sell rice to the punitive police and other people who needed it. On the evening of 13th March, a meeting was held in spite of a prohibition. About 5-30 P.M., I was returning home from my office with a friend (a vakil of Srivaikuntam) and my police orderly. On the way Mr. Ashe, the Sub-Divisional Magistrate, met me and ordered me to proceed to the place where the meeting was being held, and direct them to disperse. I did so. I was pelted with stones. My friend the vakil and my orderly were struck with stones. A stone struck me on the head which was protected by a turband. Meanwhile the Divisional Magistrate and Deputy Superintendent of Police came with a force of police and dispersed the crowd with the use of firearms. There was a serious riot. I was pursued

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and had to take refuge somewhere. The house of refuge was surrounded and I escaped by the back door. The rioters numbered about 5,000."

The sixth witness for the prosecution gave evidence with reference to the riot at Tinnevelly on the 13th March 1908.

Mr. Sadagopachariar contended that evidence of the riots was irrelevant and he referred us to Cave, J.'s charge to the jury in *The Queen against Burns and others*(1) which is set out in Russell 'On Crimes and Misdemeanors,' 6th edition, vol. I, p. 557. The only passage in the charge which would seem to bear upon this question is that in which the learned Judge leaves the question to the jury whether riots which actually took place were the natural consequences of the speeches delivered.

It has been urged before us that the real cause of the riots in Tinnevelly was the arrest of the two accused on the 12th March 1908 under the order of the District Magistrate, which was afterwards set aside by the High Court.

It seems to us to be not unlikely that the arrest was the immediate cause of the outbreak. At the same time, we think there can be little doubt that the fact of the arrest would not have occasioned a riot had it not been for the excited state of public feeling in Tuticorin and Tinnevelly—a state of things which had been brought about by the inflammatory and seditious speeches which had been delivered by the first accused and others. The speeches which form the subject-matter of the present charges were delivered at Tuticorin, but it does not seem reasonable to suggest that the effect which they produced, and which, in our opinion, they were intended to produce, was limited to the particular audience to whom they were addressed. The facility of communication between Tuticorin and Tinnevelly, is shown by the evidence of the movements of the accused on 10th March 1908 referred to in paragraph 13 of the judgment of the Additional Sessions Judge.

Upon the evidence, however, we are not prepared to hold that the riot at Tinnevelly on 13th March 1908 was one of the natural consequences of the seditious speeches of the first accused.

We are of opinion that the first accused, Subramania Siva, was rightly convicted of offences under section 124A of the Indian Penal Code.

(1) 16 Cox, 361.

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As regards the question of punishment, we think the law will be vindicated by the imposition of a sentence of six (6) years' transportation, and, subject to this modification, we dismiss the appeal of the first accused, Subramania Siva.

JUDGMENT IN CRIMINAL APPEAL No. 491 OF 1908.—The appellant V. O. Chidambaram Pillai is the second accused in Calendar Case No. 1 of 1908 on the file of the Additional Sessions Judge of Tinnevelly. The appeal of the first accused (Criminal Appeal No. 503 of 1908) has been dealt with by us and in disposing of it we have decided, after hearing counsel for both the appellants, certain questions common to the cases of both. We apply those decisions to the present appeal where they are applicable, but do not think it necessary to recapitulate them.

The offences of which the present appellant has been convicted are three offences of abetment of the uttering by the first prisoner of seditious words. The occasions are the speeches made on the 23rd and 25th of February 1908 and the 5th of March following. The appellant was not present on the last occasion, but was present on the other two, and has accordingly been convicted on one charge of an offence under sections 109 and 124A of the Indian Penal Code and on two charges of offences under sections 124A and 114 of the Indian Penal Code. He has been sentenced to transportation for life.

Mr. Sadagopachariar on his behalf has raised, besides those questions which are common to this case and to that of the first prisoner, some questions of law with which we will deal at the outset.

In the first place, he contends that the complaint of abetment (exhibit XIX) was not made by order or under the authority of the Government.

The original complaint (exhibit B in Criminal Appeal No. 492 of 1908) is not filed in the present case, but we have looked at it and find that it is in terms almost identical with exhibit U in this case, the complaint against the first accused, Subramania Siva. It was presented on the 23rd of March 1908, and, on the 6th of April 1908, exhibit XIX was presented charging the appellant Chidambaram Pillai that he was not only associated with Subramania Siva but also aided and assisted him and conspired with him to make seditious speeches

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and that seditious speeches were made by Subramania Siva in pursuance of the conspiracy.

The meaning of the Government Order (exhibit A) is clear. Complaints are to be presented alleging the commission of offences punishable under the sections stated in the order.

Now, exhibit XIX which is styled the supplemental complaint, is a complaint against Chidambaram Pillai in respect of speeches made by Subramania Siva in the months of February and March 1908, and is not, so it is argued, within the Government Order.

The argument may be sound if we are bound to read the word 'them' in exhibit A distributively, that is to say, to hold that each of the three persons named, is to be prosecuted in respect of the speeches delivered by him, but we do not think we ought so to read the order.

There is no doubt that the speeches were made in the course of a series of meetings in the holding of which the first and second prisoners were associated, and we think that the order of Government was intended to cover all offences punishable under the stated sections, and committed in connection with the delivery of those speeches. The order is wide enough to bear this construction and we are not inclined to restrict its scope. What we have to see is, "was the complaint authorised?" It was undoubtedly made by the authorised person, under colour of his authority, and we think that authority is wide enough to cover it if the offences complained of are offences punishable under the stated sections of the Indian Penal Code. The question then is, whether they are so punishable.

The charges relating to the 23rd and 25th of February 1908 are, as we have said, under sections 124A and 114 of the Indian Penal Code. Now, section 114 enacts that if a person, who would if absent be punishable as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.

If then Chidambaram Pillai being (as we assume for the present) punishable as an abettor by conspiracy, is present when his accomplice in pursuance of the conspiracy, makes a speech which constitutes an offence punishable under section 124A, he is to be deemed to have committed an offence under section

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124A. He is constructively a principal and is to be punished as such. Mr. Sadagopachariar argues that the abetment is none the less the gist of the offence. Be it so; but the offence is punishable under section 124A. Section 114 does not provide any punishment, the offence of abetment plus presence on the occasion of the crime abetted is constructively the offence abetted, and is punishable as such and not as abetment. The Government Order thus authorises the complaint made in respect of the offences alleged to have been committed on the 23rd and 25th of February 1908.

The third charge is also within the letter of the Government Order if the offence is punishable under section 124A.

The argument was that abetment of sedition is punishable under section 124A of the Indian Penal Code and is therefore one of the offences enumerated in section 196 of the Code of Criminal Procedure, but it is not one of the offences enumerated in exhibit A and therefore the prosecution is unauthorised. But exhibit A follows the section and if we are to read the words "or the abetment of such offence" into section 196, Criminal Procedure Code, there is no reason why we should refuse to read them into exhibit A. If, on the other hand, as Mr. Richmond contended on behalf of the prosecution, section 196, Criminal Procedure Code, does not deal with offences of abetment except that particular case of abetment which is defined in section 108A of the Indian Penal Code, then no order is necessary to support the complaint. This argument is supported by the case of *Queen-Empress* v. *Abdul Kadar Sheriff Saheb*(1), but it is not necessary for us to decide whether we should be prepared to follow that case or not. We think the complaint, exhibit XIX, whichever view we take, must be held to have been duly authorised.

For the reasons stated in our judgment in Criminal Appeal No. 503 of 1908, we do not think that by reason of the defects in the charges, the present appellant has been misled, and that there has been a failure of justice.

Turning to the merits, we have, in Criminal Appeal No. 503 of 1908, considered the credibility and weight of the prosecution evidence and that adduced on behalf of the present appellant.

(1) (1897) I.L.R. 20 Mad. 8.

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We accept the prosecution evidence as giving a substantially correct summary of the speeches delivered by both the accused and we have now to consider whether this evidence and the other evidence in the case is sufficient to establish the appellant's abetment by conspiracy of the offences committed by the first accused.

If Chidambaram Pillai engaged with Subramania Siva in a conspiracy to excite disaffection towards the Government, and if, in pursuance of that conspiracy, and in order to the exciting of disaffection an act 'took place,' then Chidambaram Pillai is guilty of abetment of the excitement of disaffection (section 107, Indian Penal Code).

The first question then is, was there a conspiracy?

The evidence is circumstantial, and is dealt with in paragraphs 29 to 33 of the judgment of the Additional Sessions Judge. He finds it proved that Subramania Siva lived while at Tuticorin in the house of the appellant Chidambaram Pillai (paragraphs 30 and 31), that Chidambaram Pillai was an influential man while Subramania Siva was a stranger to Tuticorin and without influence there, that Chidambaram Pillai usually closed the meetings and announced the time and place of the next meeting, and that both men constantly spoke upon the same platform and usually came and left together (paragraphs 32 and 33). He also refers to certain incidents some of them proved by the defence evidence to show that Chidambaram Pillai was regarded as the principal organiser of the series of meetings.

There is no doubt, and it is not denied, that a series of open air meetings was held at Tuticorin commencing early in February and continuing over the first half of March, at which the first accused was the principal speaker, and it is proved beyond doubt that the second accused also spoke at the meetings of the 19th, 22nd, 23rd, 24th and 26th of February and of the 4th of March 1908. Meetings were held privately on the 27th and 28th of February 1908 in a place which, according to the prosecution eleventh witness, belonged to the second accused, though the notice calling the meetings (exhibit M1) was issued by a man who was the second accused's clerk, and the building is therein called 'my building.'

On the 25th of February 1908 the appellant was present at the meeting and announced the next meeting but did not otherwise speak. He was also present on the 1st of March and then announced a meeting for the 3rd, and on the 5th of March 1908 he was not present. The speeches of which we have any record commenced on the 19th February 1908, but the evidence shows that even before that, there were meetings some of which were attended and addressed by the appellant.

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It may be that the meetings were originally organised by the Young Men's Patriotic Association (*vide* exhibit M4), but that series of meetings was to last for a week only from the 3rd of February 1908, and according to the defence sixth witness who was the Secretary of the Association, when that series was over, 'other' lectures were delivered by the first accused. It is not shown that Chidambaram Pillai was a member of the Young Men's Patriotic Association but he was associated with the lectures of Subramania Siva and others, soon after the campaign opened, and the evidence shows that even if the later speeches were a continuation of the original programme, Chidambaram Pillai must have early taken part in the operations of the organising body: exhibit M4 is perhaps evidence of conspiracy against the members of the association: it does not help the appellant. There is some very vague evidence by the defence thirty-sixth witness and defence fortieth witness on this point. The latter says that "the sangam" would announce the meetings, but he does not say how or through whom: it may have been by the mouth of the appellant: he is unable to say who made the arrangements for the next meeting on the two occasions to which he speaks, and seems to try to leave the impression that the audience settled it themselves without reference to any one in particular, whereas the prosecution second witness makes it clear that on one occasion on which the audience asked for a particular locality, the appellant announced that the meeting would be held there (*vide* page 18 of the printed evidence). This evidence on behalf of the defence is far from convincing, and as the witness has to admit that both the accused were present on these occasions, the police evidence is more easily accepted.

The prosecution evidence that Chidambaram Pillai usually came to the meetings with Subramania Siva is not of much importance. There is evidence on the other side that he usually came late after his office closed, but that is not very well established. The witnesses have at best to trust to their memories for an incident some months old which, as the defence thirty-sixth

witness says, was not a striking incident at the time. There is some improbability in supposing that several persons on the 23rd of February 1908 marked down in their memories the fact that Chidambaram Pillai was not present from the beginning of the meeting. The general evidence that his office did not close till 6 P.M. and he did not come as a rule till later, is more likely to be accurate; but even here there is room for much doubt. Chidambaram Pillai was not a clerk in the office: it is not suggested that he was bound to certain hours, and if on some days in February or March 1908 he left office early to push his company's interests in open air meeting, there would be nothing strange in his conduct.

He was clearly not very late on the 19th of February 1908, for on that day Subramania Siva made a second speech after he had finished speaking; and it is clear that he was not late on the 1st of March 1908 for he opened the proceedings on that day (*vide* exhibit D). It is probable that he was late on the 23rd of February 1908. The announcement at one meeting of the date and place of the next was, it is contended on the strength of a statement by the prosecution second witness (page 18 of the printed evidence), the duty of the last speaker on each occasion. But there is no evidence that in making his announcements Chidambaram Pillai consulted any one else: even on the occasion on which it is said the audience suggested a place of meeting, it is not shown that Chidambaram Pillai, before making his announcement accordingly, consulted any one as organiser of the meetings (page 18 of the printed Sessions records), and it was not always the last speaker who made the announcement, for on the 1st March 1908 Padmanabha Aiyangar spoke last, but Chidambaram Pillai announced the next meeting (*vide* page 18 of the printed evidence).

There is thus good evidence that Chidambaram Pillai was present at most of the meetings and spoke at many of them and made arrangements for their continuance. That is enough to indicate that he was one of the organisers of the course and to afford reasonable ground to believe that he was, in concert with others, causing the delivery of the speeches which were delivered. And this evidence is supplemented by other evidence circumstantial but important. These circumstances negative the view that he was merely a sympathiser, casually present at the meetings

and called on as a popular character to make speeches occasionally. Such a view is not open to any one taking a reasonable and impartial survey of the evidence.

On the 1st of March 1908 the Sub-Magistrate, prosecution fourteenth witness, asked Chidambaram Pillai to change the place of meeting. He did not reply that he had nothing to do with the arrangements: he said he could not change his programme; and on that very evening we find him closing the meeting early because he had promised the authorities so to do (exhibit D). This conduct is entirely inconsistent with the allegation that he was not concerned with the organisation of the meetings, an allegation which was made for the first time at the trial of this case.

Similarly, though perhaps not so obviously, inconsistent with the case put forward by the defence is his conduct in announcing his intention of promulgating his sangam rules at one of the meetings, and his subsequent announcement that he would withhold them for a further meeting as they required modification in consequence of the arrival of news from England. If he spoke merely in response to the popular demand these announcements would never have been made. He clearly utilised the lectures as a means of enlisting recruits for the sangam, a fact which itself indicates the improbability that he was merely a casual speaker thereat. Then as the Additional Sessions Judge points out, one defence witness spoke of the meetings as meetings of Chidambaram Pillai and Subramania Siva: another (defence tenth witness) spoke of Chidambaram Pillai as "presiding" at the meetings though in friendly cross-examination on behalf of the second accused he explains that away in no very convincing manner (page 103 of the printed evidence): a third witness for the defence (defence twenty-seventh witness) in cross examination stated that Chidambaram Pillai "assisted" Subramania Siva in *organising* the meetings, but in re-examination gave the not very satisfactory explanation that he meant that he spoke after Siva (page 126 of the printed Sessions records).

We do not attach to these expressions any very great importance, but they all point in the same direction. The witnesses cannot altogether conceal their belief that Chidambaram Pillai was a leading spirit in the affair.

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The Additional Sessions Judge has analysed the evidence on the question whether Subramania Siva and Chidambaram Pillai lived in the same house, and we think he has arrived at the right conclusion. As he points out, the great defect in the defence evidence is the absence of the witnesses Sadagopa Aiyangar and Rama Aiyangar who ought to have been able to explain all that took place: but, whether Subramania Siva actually lived in the house of the appellant or whether he only used his well for bathing and his library for reading, and slept and fed himself elsewhere, it is quite clear that both men were very closely associated together during the period over which the speeches extended.

So far, the evidence relates to the conduct of the appellant himself and it is not necessary to have recourse to section 10 of the Indian Evidence Act to admit it. Another incident on which the Additional Sessions Judge relies is a statement of Subramania Siva on the 9th of March 1908, at Tinnevelly which is set out at the end of paragraph 32 of his judgment. If this statement is otherwise admissible under section 10 of the Indian Evidence Act, there can be no doubt that it cannot be rejected on the ground suggested by Mr. Sadagopachariar that there is no reasonable ground to believe in the existence of a conspiracy. The other evidence gives sufficient reason for this belief to warrant the application of the section. The statement has reference to a common design to make speeches, and is evidence, though not of itself very strong evidence, of the existence of a conspiracy. We think it is admissible. It cannot be explained away by the suggestion that the speaker referred to himself and his audience, for his audience at Tinnevelly had not been associated with him, so far as the evidence shows, on any previous occasion; it obviously referred to himself and Chidambaram Pillai who were then under trial before the District Magistate along with the third man to whom reference is made. The evidence then proves, beyond any reasonable doubt, the existence of a common design, in pursuance of which speeches were made by Subramania Siva, and it remains to be seen whether that design included the commission of offences under section 124A of the Indian Penal Code.

Now it was strongly urged by Mr. Sadagopachariar that however admissible may be the speeches of the first accused to prove

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his 'animus,' intention, or meaning, the speeches of Chidambaram Pillai cannot be admitted to prove abetment. But we think that these speeches are admissible to prove the object of the conspiracy. It is found that an agreement existed in pursuance of which speeches were made by two parties to the agreement, and the remaining question being, what was the object of that agreement, what was the 'thing' for the doing of which that agreement was made, there is no better evidence short of a reasonable and credible statement of objects and reasons by the parties or witnesses on their behalf, than that afforded by their sayings and doings in pursuance of the agreement. For this purpose we confine ourselves to the series of speeches delivered at Tuticorin between the 19th of February and the 5th of March 1908. As to them there is no doubt that they formed a regular course of discourses made in pursuance of the agreement; the speeches made at Tinnevelly on the 9th and 11th of March 1908 probably did not form a part of that course and it may be doubted therefore whether they can be admitted to prove the object of the agreement, though statements made in them may be admissible for other purposes—as for instance, under section 10 of the Indian Evidence Act.

Now, whatever may have happened before the 19th of February it is clear that on that day Subramania Siva made a speech in which in plain language he put before his audience the goal to which they should aspire, the overthrowing of the British supremacy and the liberation of India from a foreign yoke.

There is no evidence that Chidambaram Pillai came late on that day to the meeting but assuming that he did, it would be puerile to suppose that he did not, in spite of his close association with Subramania Siva at this period, know soon after this meeting what it was that was said. However, on the 19th of February 1908, Chidambaram Pillai was not so late but that after his speech Subramania Siva was able to make a second speech.

Now Chidambaram Pillai followed Subramania Siva with a speech of his own. It contains no word of dissent from Subramania Siva's views but it is occupied mainly with the promotion of a sangam or association, the members of which were to pledge themselves to consume only goods manufactured in India (*vide*

page 174 of the printed evidence). The speech reads as though the speaker had doubts as to the legality of the association, and knew that his audience had similar doubts: he tells them that it is not illegal, that the fears entertained by Europeans were groundless, that they must not be afraid to join, that he will bear the burden if anything goes wrong, and finally that there is no need for fear (this seems to be the connection) because that part of the people of India which is anyhow fated to die in one year could, if they would make up their minds to die at once, do away with all the Europeans in the country.

On the 22nd of February 1908, he advances the matter a little by pointing out three ways "to regain our lost position." Refuse to buy foreign goods, refuse to appeal to the authorities on any occasion, and refuse the education of Government schools: they must do this, if they want to obtain *swaraj*.

On the 23rd of February 1908 the idea is again made clearer: if all the Indians unite the Europeans must leave the country: we could easily drive them away by force, but though we ought not to use force, we ought to have no fear of them: our method of driving them out is to boycott foreign goods and then they will have to go.

On the 24th of February 1908, he excuses his non-production of the promised rules of the sangam by saying that he has to alter them in consequence of a sympathetic speech by Lord Morley. The sangam is therefore political, not commercial, or at any rate not solely commercial.

On the 26th of February 1908 the appellant's speech is concerned with the boycott of the Madura Company and the strike at the Coral Mills and contains no further suggestion for the attainment of *swaraj* through boycott. Then followed speeches in private places; and on the 28th of February 1908, the day on which the District Magistrate was in Tuticorin, the appellant was found dissuading the mill hands from continuing the strike: "Go back to work" was his advice "but demand more pay."

On the 1st of March 1908, though the appellant was present he did not speak except to close the meeting apparently because it was necessary that day to close early.

On the 4th of March 1908, he again continues his course and after giving a somewhat optimistic sketch of the prospects of the

Swadeshi Steam Navigation Company and the cotton spinning business he again explains that the way to obtain *swaraj* is to avoid the courts both civil and criminal: then the Government will see that we have no need of them and will of necessity yield: we must show that we want no foreign help.

In all these speeches, there is no word of dissent from Subramania Siva's cult of 'Absolute *swaraj*.' On the contrary, this 'Absolute *swaraj*' is to be arrived at by means of the boycott and abstention from all recourse to the authorities. *Swaraj* through boycott is the burden of the speeches and the *swaraj* aimed at clearly involves the departure of all foreigners from India.

It may be that Chidambaram Pillai's own object was to some extent commercial: he was interested to a great extent in the Swadeshi Steam Navigation Company and other industrial enterprises and he may have discovered by the 19th of February 1908 that ordinary commercial competition was not likely to be effectual against such powerful and long established rivals as the British Indian Steam Navigation Company and the Coral Mills, and that his best chance of success was to secure the adhesion of his countrymen to his concerns by appeals to patriotic motives.

To succeed, it was necessary to instil into their minds an aversion from everything foreign, and it may be that some such object as this inclined him to the adoption of the political programme of 'Absolute *swaraj*.' That he did adopt that programme his speeches leave no room for doubt.

It is true that in another case (S.C. No. 2 of 1908 on the file of the Court of the Additional Sessions Judge of Tinnevelly: Criminal Appeal No. 492 of 1908 on the file of the High Court) he did allege and call evidence to prove that he expressed dissent from Subramania Siva's interpretation of the word *swaraj* but except for that belated disavowal (if we can consider it in this case) the evidence in support of which we have found ourselves unable to accept, there is nothing to suggest that his views in any way differed from those of Subramania Siva. He cannot be acquitted of disloyalty merely because he deprecated violence; and his exhortations not to create disturbances and his acquiescence in the request of the authorities as to closing a meeting early are in our opinion due to a natural desire that the course of the meetings

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should not be interrupted. He was then as his speeches show in accord with Subramania Siva's views: he organised the series of speeches with Subramania Siva, in which Subramania Siva's role was that of the political propagandist while he himself followed up with his economic disquisition. Each entered from time to time on the other's ground, and the goal to which both pointed was the departure of all foreigners and all things foreign from the land and the resulting *swaraj* and prosperity.

The evidence leaves no room for any real doubt that the political speeches of Subramania Siva were a part of the programme, and the delivery of those speeches involved, as we have found in Criminal Appeal No. 503 of 1908, the excitement of disaffection against the Government. This was one of the things to be done in pursuance of the conspiracy, and as soon as it was done, the appellant was guilty.

The charges are in respect of the speeches of Subramania Siva delivered on the 23rd and 25th of February and the 5th of March 1908, and we have found, on a consideration of all the evidence and after hearing counsel for both the appellants, that those speeches constituted offences punishable under section 124-A of the Indian Penal Code. The appellant V. O. Chidambaram Pillai was therefore rightly convicted.

As regards the question of punishment, we think that in this case as in Criminal Appeal No. 503 of 1908 the law will be vindicated by a sentence of six years' transportation.

Subject to this modification of the sentence, the appeal of V. O. Chidambaram Pillai is dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Munro and Mr. Justice Sankaran-Nair.

EMPEROR

v.

MADIGA NALLAVADU.*

1908. November 18.

Criminal Procedure Code—Act V of 1898, s. 339, cl. 3—How sanction of High Court under section obtainable.

The sanction of the High Court under section 339 (3) of the Code of Criminal Procedure can be obtained only by motion on behalf of the Crown.

Queen-Empress v. *Manik Chandra Sarkar*, (1897) (I.L.R., 24 Calc., 492), followed.

PETITION under section 339, clause 3 of the Code of Criminal Procedure, by M. Ghose, Sessions Judge of Cuddapah, for sanction of the High Court to prosecute an approver.

The facts are sufficiently stated in the letter of Sessions Judge which is as follows:—

In Sessions Case No. 42, three accused were tried on a charge of murder under section 302, Indian Penal Code, having been committed for trial by the Sub-Magistrate, Madanapalli. One of the witnesses for the prosecution was one Madiga Nallavadu who was made an approver having been accorded a conditional pardon by the District Magistrate under section 337, Criminal Procedure Code.

2. In his deposition before this Court the approver, Nallavadu, stated that only the second accused beat the deceased, whereas, before the Committing Magistrate he said that both the second and third accused beat her, and when asked if he made such a statement in the lower Court, he denied having said so. In thus denying he had given false evidence and I accorded sanction for his prosecution under section 193, Indian Penal Code, but the Head-quarters Deputy Magistrate, Cuddapah, to whom the approver was sent considers the sanction of High Court necessary.

3. Section 339 (3), Criminal Procedure Code, requires the sanction of the High Court only when the prosecution relates to any

* Criminal Miscellaneous Petition No. 286 of 1908.

MUNRO AND SANKARAN-NAIR, JJ.

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false averment contained in the statement made by the approver relative to the offence under inquiry. Pardon was granted to the approver on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence, and, if in narrating the circumstances he utters a falsehood, the sanction of the High Court would certainly be necessary for his prosecution. In the present case, however, his prosecution has been sanctioned not on the ground that he failed to satisfy the conditions under which the pardon was granted or that he made a false averment in narrating the circumstances of the offence but on quite an independent ground, viz., that he denied having made a statement which he actually did make as is shown by the record of his deposition in the lower Court. Such a case does not in my opinion come under the purview of section 339, clause 3 of the Criminal Procedure Code. But as the Deputy Magistrate considers my sanction insufficient I have the honour to solicit the sanction of the High Court for prosecuting the approver under section 193, Indian Penal Code.

4. The approver's deposition in this and the lower Court and a copy of the judgment in the case are herewith submitted for perusal.

The Acting Public Prosecutor in support of the reference.

ORDER.—If the sanction of the High Court is desired under section 339 (3), there should be a motion on behalf of the Crown—vide *Queen Empress* v. *Manick Chandra Sarkar*(1). We therefore decline to do anything on the Sessions Judge's letter. The records will be returned.

(1) (1897) I.L.R., 24 Calc., 492.

APPELLATE CRIMINAL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Wallis, Mr. Justice Miller, Mr. Justice Sankaran-Nair and Mr. Justice Pinhey.

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v.

EMPEROR.*

1908. April 15, 23. September 4, 21.

Criminal Procedure Code—Act V of 1898, *s.* 476—*Action under, must be taken at or immediately after the conclusion of the judicial proceedings.*

On the question whether a Court has jurisdiction to take action under section 476 of the Code of Criminal Procedure at any time after the conclusion of the judicial proceeding in the course of which the offence is committed.

Held, by the Full Bench (Miller, J., dissenting) that the power conferred by section 476 can be exercised by the Court only in the course of the judicial proceeding or at its conclusion or so shortly thereafter as to make it really the continuation of the same proceeding in the course of which the offence is committed.

Rahimadulla Sahib v. *Emperor*, (1908, I.L.R., 31 Mad., 140), followed.

In re Lakshmidas Lalji, (1908, I.L.R., 32 Bom., 184), not followed.

Per ARNOLD WHITE, C.J.—Section 476 is a self-contained section. Sub-section (1) gives the Court power to put the law in motion, and sub-section (2) provides the procedure to be followed when the law has been put in motion.

Per MILLER, J.—There is nothing to make section 476 inapplicable to any case to which the language of the section applies. The procedure provided by the section is not incompatible with the commencement of action by the Court after the close of the proceeding in the course of which an offence is committed or disclosed.

Per SANKARAN-NAIR, J.—A Court may grant sanction at any time and to any person whom it considers fit to carry on the prosecution and who is entitled to proceed under section 190, Criminal Procedure Code.

The order under section 476 is a judicial proceeding and not a complaint under section 195.

Per PINHEY, J.—Sections 195 and 476 must be read together, and section 476 prescribes the procedure to be adopted by the Courts when making a complaint. It was however the intention of the Legislature to restrict their power in this direction and only to suffer it when promptly exercised.

The decision in the case of Rahimadulla Sahib does not decide that the final order under section 476 of the Criminal Procedure Code must issue at once. The Court must commence to take action under the section promptly, in which

* Crl. Misc. Petition No. 50 of 1908.

WHITE, C.J., WALLIS, MILLER, SANKARAN-NAIR AND PINHEY, JJ.

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case it may be considered as a continuation of the proceedings; and although the final order may be delayed for sometime by necessary enquiries, the order will not be bad for want of jurisdiction.

CRIMINAL Miscellaneous Petition praying that, in the circumstances stated therein, the High Court would be pleased to issue an order directing the revocation of sanction granted by C. G. Spencer, District Judge of Tinnevelly, in Proceedings, dated 16th November 1907, in Compensation Reference No. 3 of 1907, and directing the stay of Proceedings in Calendar Case No. 1 of 1908 on the file of the Head-quarters Deputy Magistrate, Tinnevelly. The facts necessary for this report are sufficiently set out by (Benson and Miller, JJ.) in the Order of Reference to the Full Bench which was as follows:—

ORDER OF REFERENCE.—"In this petition we are asked to set aside, as made without jurisdiction, the order of the District Judge of Tinnevelly directing, under section 476, Criminal Procedure Code, the prosecution of the petitioner for giving false evidence and using as genuine a forged document, offences under sections 193 and 471, Indian Penal Code.

The facts of the case are briefly as follows:—

The witness was examined in a certain case before the District Judge on the 17th September 1907, and there was reason, at once apparent, for thinking that the evidence was false. Judgment in the case was pronounced on the 8th October 1907. On the 29th October 1907 the District Judge ordered notice to issue to the petitioner to show cause why he should not be prosecuted. The petitioner's explanation was recorded on the 15th November, and his prosecution was ordered on the 16th November 1907, under section 476, Criminal Procedure Code. The District Judge appears to have acted *suo motu* in issuing notice on the 29th October, and the record before us does not give any reason for his not taking action between the 8th and the 29th October. We are asked to set aside the order of the District Judge on the ground that, as the offence, if any, came to his notice on the 17th September, and as the case in which the offence was committed came to an end on the 8th October, the District Judge had no jurisdiction to take action under section 476 after so long an interval as three weeks, that is, on the 29th October, and to make an order for prosecution on the 16th November 1907.

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The petitioner relies on the decision of the Full Bench in the recent case of *Rahimadulla Sahib* v. *Emperor*(1).

In that case the majority of the Full Bench held that "an order under the section should be made either at the close of the proceedings or so shortly thereafter that it may be reasonably said that the order is part of the proceedings." It would, we think, be difficult on the facts to distinguish the present case from that before the Full Bench, and we should ordinarily feel bound to follow the decision of the Full Bench. But in the recent case of *Ramiah Naik*(2), a Bench of, this Court (Benson and Munro, JJ.) expressed a desire to have the question decided by the Full Bench further considered, and they would have asked for it in that case but that they were able to dispose of the case on other grounds. Referring to the decision of the majority, as quoted above, the Division Bench said: "Miller, J., however, dissented from that view and adduced what appear to us to be cogent reasons for his conclusion. The view taken by the majority was largely based on certain *obiter dicta* of a Full Bench of the Calcutta High Court in *Begu Singh* v. *Emperor*(3). These *dicta* have been recently examined by a Bench of the Bombay High Court *In re Lakshmidas*(4) and have been dissented from for reasons based *inter alia* upon a consideration of section 195 of the Criminal Procedure Code, which must be read with section 476 in order to determine the procedure intended by the Legislature to be followed in cases where perjury is committed before a Court. The bearing of this section on the question before them, though touched on by Miller, J., was not referred to by the other Judges. The inference to be drawn from it is, however, in our opinion, almost conclusive against the view of the majority. Having regard to these considerations and also to the evident hesitation with which Wallis, J., arrived at his conclusion, we would propose that the question should be further considered by the Full Bench if it were necessary for us to do so on the facts of the case."

In view of this expression of opinion by the Division Bench and of the reasons on which it is based (with which we concur),

(1) (1908) I.L.R., 31 Mad., 140.
(2) Crl. Misc. Petition No. 227 of 1907 (unreported).
(3) (1907) I.L.R., 34 Calc., 551. (4) 10 Bom. L.R., 28.

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we resolve to refer for the decision of the Full Bench the question whether, on the facts stated by us, the order of the District Judge in the present case was made without jurisdiction.

The case came on for hearing in due course before the Full Bench constituted as above.

C. Madhavan Nair for petitioner.

J. L. Rosario for the Acting Public Prosecutor *contra*.

The Court expressed the following

OPINIONS (WHITE, C.J.).—The question raised in this Order of Reference was considered by a Bench of three Judges in *Rahimadulla Sahib* v. *Emperor*(1). The learned Judges by whom the present Order of Reference was made were desirous, for the reasons stated in the Order of Reference, that the question should be further considered.

I have carefully considered the points taken in the Order of Reference and the judgments of the Bombay High Court in the case *In re Lakshmidas Lalji*(2), and I am of the same opinion as I was when the case was first argued before a Full Bench.

Sub-section (2) of section 476, Criminal Procedure Code, indicates the procedure which is to be followed when an order under sub-section (1) has been made. The sub-section says "such Magistrate shall thereupon, etc.," that is after the making of an order under sub-section (1). With all respect to the learned Judges who take a different view I cannot see how sub-section (2) throws light on the question of the time when the order under sub-section (1) must be made. The express reference to section 476 in section 200 would seem to show that the object of section 476 (2) was to relieve the Magistrate who makes the order under section 476 (1) from the obligation of making a complaint on oath before the Magistrate to whom the case is sent for inquiry or trial. I do not think it follows that because a complaint can be presented at any time subject to the law of limitation, an order under section 476 (1) can be made at any time.

With great respect I am unable to agree with the observation of Chandavarkar, J., in *In re Lakshmidas Lalji*(1) "section 476, clauses (1)and (2), therefore, define the form, scope and nature of *the complaint* mentioned in clauses (*b*) and (*c*) of section 195. And the two clauses of the former section must be read with the two clauses

(1) (1908) I.L.R., 31 Mad., 140. (2) (1908) I.L.R., 32 Bom., 184 at p. 189.

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of the latter, when any question about a prosecution started *upon the complaint* of a Court arises." I think section 476 is a self-contained section: sub-section (1) gives the Court power to put the law in motion and sub-section (2) provides for the procedure to be followed when the law has been put in motion. For the purposes of the question which has been referred to us it seems to me immaterial whether the section is to be construed as empowering the Court to make an order when the judicial proceeding in the course of which the alleged offence is brought to the notice of the Court is subsequent to and independent of the judicial proceeding in connection with which the offence is alleged to have been committed, or whether the judicial proceeding must be the same. In either case I think the order under section 476 must be part of the judicial proceeding in which the alleged offence is committed or brought to the notice of the Court.

I am of opinion that the order of the District Judge was made without jurisdiction.

WALLIS, J.—I adhere to my previous judgment in the case of *Rahimadulla Sahib* v. *Emperor*(1), and am of opinion that the question should be answered in the negative assuming that proceedings under section 476 were first taken on the 29th October.

MILLER, J.—I remain of the opinion which I have already expressed in my judgment in *Rahimadulla Sahib* v. *Emperor*(1) and I am fortified by the decision in *In re Lakshmidas Lalji*(2). At page 190 of the report Chandavarkar, J., says "we fail to find anything in the language of section 476 which makes it incumbent upon a Court acting under it to exercise the power within any period or at any particular time. Such a construction necessitates the importing into the section of words which are not there; and for which there is no necessary implication from the language used by the Legislature." Knight, J., entirely concurred in the reasoning of Chandavarkar, J., and my view of the section is by these opinions strongly confirmed.

Mr. Madhavan Nair in the course of his argument cited certain decisions (which I think it unnecessary to quote) to show that the powers which the Bombay High Court and I consider are conferred on Courts by section 476 are not necessary to ensure the due punishment of offenders against public justice. The Court,

(1) (1908) I.L.R., 31 Mad., 140. (2) (1908) I.L.R., 32 Bom., 184.

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according to his contention, can direct some officer to apply for sanction to prosecute, or can of its own motion issue a sanction and direct some one to act on it, or may so to speak shoot a sanction into the air in the hope that it may fall to earth some where within the ken of a Magistrate empowered to take cognizance of the offence. These powers, he says, can be exercised whether the offence comes to light in the course of the proceeding or after its close, and hence there is no necessity for action under section 476.

Assuming that these powers or some of them are conferred by the law, though other authorities including the learned Judges in *In re Lakshmidas Lalji*(1) take a different view of the meaning of a sanction "given" under section 195, Criminal Procedure Code, it may be that the ground is cut away beneath the argument from necessity, but with it falls also the counter-argument from policy.

It can hardly be seriously contended that the Legislature has felt itself bound to withhold from the Court the power of taking the convenient course of taking action itself in a case in which it empowers it to compel some one else to take action.

Granting then that section 476 is self-contained and has nothing to do with section 195, I am still unable to see why the former section should be held inapplicable to any case to which its language is applicable.

It was contended by Mr. Rosario for the Public Prosecutor that section 476 would empower, let us say, District Judge A to prosecute an offender for an offence disclosed in a judicial proceeding before himself but committed in relation to a proceeding before District Judge B. I do not desire to express any opinion as to the soundness or otherwise of this contention, and only refer to it because if it is sound, the illustration which I utilized in my judgment in *Rahimadulla Sahib* v. *Emperor*(2) and which resembles that used by Chandavarkar, J., in the Bombay case, might not be quite opposite. It would be necessary then for my purpose to put a case in which the second proceeding, that in which the offence is disclosed, is not a judicial proceeding; it might be put that sometime after the close of the suit in which a forged document was used as genuine, the offence is disclosed during an examination of the document by an officer of the Court with a view to grant a copy or in connection with an application for the return of

(1) (1908) I.L.R., 32 Bom., 184. (2) (1908) I.L.R., 31 Mad., 140.

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documents. The officer brings the offence to the notice of the Judge and the Judge decides to prosecute. In my view section 476 enables him to do so.

In my judgment in *Rahimadulla Sahib* v. *Emperor*(1), at page 150, I endeavoured to show that there is nothing in the procedure provided by section 476 incompatible with the commencement of action by the Court after the close of the proceeding in the course of which an offence is committed or disclosed. As a further support to the remarks I then made, I may refer to section 53 (2) of the Provincial Insolvency Act where the same procedure is provided for cases where the Court sees reason to believe that an undischarged insolvent has committed the offence of obtaining credit without disclosing his position, an offence which is unlikely to be committed in the presence of the Insolvency Court, and which may not infrequently be brought to notice in a proceeding to which the offender is not a party. The legislature evidently does not contemplate any difficulty in the way of holding a preliminary enquiry in such cases and sending the offender to the Magistrate.

I am of opinion that the order in the present case was made with jurisdiction and would answer the question accordingly.

SANKARAN-NAIR, J.—I agree generally with the learned Judges of the Calcutta High Court and with the Chief Justice and Wallis, J., in their decision in *Rahimadulla Sahib* v. *Emperor*(1), that the power conferred by section 476, Criminal Procedure Code, can be exercised by the Court only in the course of the judicial proceeding or at its conclusion, or so shortly after as to make it really the continuation of the same proceeding in the course of which the offence was committed or brought to its notice.

I propose to deal first with the opinion of the Bombay High Court that such a conclusion would be disastrous to the administration of justice, and that section 476, Criminal Procedure Code, if read with section 195, must lead to the opposite conclusion.

Under section 190, Criminal Procedure Code, any Magistrate therein referred to may take cognizance of an offence upon (1) complaint, (2) police report, (3) information otherwise derived or his own knowledge or suspicion. But with respect to certain offences referred to in section 195 the Magistrate shall not

(1) (1908) I.L.R., 31 Mad., 140 at p. 150.

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take cognizance "except with the previous sanction, or on the complaint" of the public servant or the Court, as the case may be, therein referred to. A private prosecutor therefore must obtain the sanction before filing his complaint. But I see nothing to prevent a police officer from obtaining sanction under this section, and then filing a complaint or submitting a report to the Magistrate for him to take cognizance of the offence under section 190. Similarly if a Magistrate wishes to act in a fit case upon any other information or upon his own knowledge or suspicion he has only to apply for sanction under section 195. Nor is there anything to preclude a Public Prosecutor from obtaining the necessary sanction for any person to file a complaint. The Madras High Court has gone further and held that the sanction may be granted to any person, and when granted others may act under it and the Magistrate may take cognizance. (*In re Chinna Meeran*(1), *In re Thathayya*(2) and *Queen-Empress* v. *Subbaraya Pillai*(3).) But however that may be, I have no doubt that any person competent to act under section 190 may apply for sanction. I can imagine no case therefore where, when the Court is willing to complain or give sanction under section 195, any legal impediment exists to prosecution for offences referred to in section 195 which does not equally exist in respect of the far graver offences like murder or dacoity, not included in section 195. The learned Judges of the Bombay High Court, it appears to me, labour under the misconception that the sanction under section 195 can be granted only to a private prosecutor by which, I presume, is intended the person injured. I see no reason for that assumption. In my opinion a Court may grant sanction at any time, and to any person it considers fit to carry on the prosecution and entitled to proceed under section 190, Criminal Procedure Code.

Another ground of decision in *In re Lakshmidas Lalji*(4) is that section 476, clauses (1) and (2), Criminal Procedure Code, only prescribe a special procedure for the Court to follow when it exercises the power to make a complaint under section 195 and as the former section only defines the form, scope and nature of the complaint under section 195 there is no reason why the power

(1) 2 Weir, 596.
(2) (1889) I.L.R., 12 Mad., 47.
(3) (1895) I.L.R., 18 Mad., 489.
(4) (1908) I.L.R., 32 Bom., 184 at 189.

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under section 476 may not be exercised any time after the close of the proceedings as a complaint under section 195 may be filed at any time.

I am unable to agree with the learned Judges. Is it not open to a Court instead of following the procedure prescribed by section 476 to present a complaint like any other ordinary person before a Magistrate? If so how can the 'form' be the same? A complaint may be made under section 195 when the matter requires investigation. An order is to be passed under section 476 when a *primâ facie* case is made out. This will explain many of the differences which will now be referred to. There are many cases falling within section 195 which do not fall within section 476 as the latter section is confined to judicial proceedings, while the former is not. Conversely there are cases falling within section 476 but not within the operation of section 195, as the offences in clause (*c*) of the section must be committed by a party to the proceeding while the scope of section 476 is not so restricted and applies for instance to witnesses of parties (*In re Devji Valad Bhavani*(1)). The limitation of section 476 to judicial proceedings is explicable if it is a judicial order. Its reason is not clear if it is a complaint under section 195. The complaint under section 195 must be made before a Magistrate having jurisdiction under the ordinary provisions of the Code; while section 476 confers an exclusive jurisdiction on the 'nearest' First-class Magistrate (see *Queen-Empress* v. *Nagappa*(2)), who may not have any power to enquire and try, if a complaint were laid before him under section 195; for instance a Court in Madras has to send the case to a First-class Magistrate out of Madras to the exclusion of the Presidency Magistrates. The Magistrate to whom a case is sent under section 476 has to dispose of the case after 'inquiry' or 'trial' as the case may be, but not upon the result of any 'investigation' by a police officer or any other person than a Magistrate or police officer as a Magistrate taking cognizance of a complaint under section 195 is entitled to do under section 203. Further, an investigation under section 202 can only be ordered after the *examination* of the complainant and cannot therefore be directed by a First-class Magistrate acting under section 476. When an order under that section may make it possible for the Magistrate

(1) (1894) I.L.R., 18 Bom., 581.
(2) (1893) I.L.R., 16 Mad., 461.

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to begin the 'trial' without any preliminary inquiry, it appears difficult to treat that order as a complaint or anything in the form of a complaint. It has now been decided by all the High Courts, including the Chief Courts of the Punjab and Burma, that an order passed, at least by a Civil or Criminal Court, under section 476 may be set aside by the High Court, *In the matter of the Petition of Bhup Kunwar*(1), *Emperor* v. *Gopal Barik* (2), *In re Bal Gangadhar Tilak*(3), *Suryanarayana Row and Bala Ramayya* v. *Emperor*(4); the Madras High Court (see *Suryanarayana Row and Bala Ramayya* v. *Emperor*(4), and *Eranholi Athan* v. *King-Emperor*(5)), differing from the rest only as to the grounds on which it may be set aside, while it seems clear that a High Court has no power to reject or direct the Magistrate to reject a complaint preferred under section 195. There is thus all the difference between a complaint under section 195 and an order under section 476 that exists between the act of a party and an order by a Court. I am unable therefore to hold that an order under section 476 is the complaint under section 195, and I therefore decline to accept the reasoning based on that assumption.

In construing section 476 it must be remembered that the power to send for enquiry and arrest is conferred also on Revenue Courts, that is, on Tahsildars (*Queen-Empress* v. *Munda Shetti*(6)), and, if the Punjab Chief Court is right, on Income-tax Officers whose proper function is not the administration of justice but the collection of revenue and who are not subject to any control by the High Court.

The words of the section contemplate immediate action, and the scheme of the Code requires it. When a Court in the course of any proceeding sees reason to suspect the commission of any offence referred to in section 195, then the Court may set the criminal law in motion for the detection of the offence or the conviction of the supposed offender by filing a complaint. It would then be open to the Magistrate to direct an investigation and reject it or proceed with the enquiry. When the Court in the course of the judicial proceeding after the examination of the

(1) (1904) I.L.R., 26 All., 249; (1908) All. W.N., 27.
(2) (1907) I.L.R., 34 Calc., 42. (3) (1902) I.L.R., 26 Bom., 785.
(4) (1906) I.L.R., 29 Mad., 100; 1 Crim. L.J., 25; 3 L. Burma, 234; (1902), 3 Punjab W.R. Crim., 13 or 7 Crim. L.J., 281.
(5) (1903) I.L.R., 26 Mad., 98. (6) (1901) I.L.R., 24 Mad., 121.

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witnesses and any further enquiry that may be necessary finds that a *primâ facie* case has been made out and there is a reasonable probability of conviction, it may send the case at once for "inquiry or trial"—the words are mutually exclusive—under section 476. The case then has passed beyond the stage of investigation, the opinion formed by the Court after hearing the witnesses in a judicial proceeding dispensing with its necessity. Or the Court may commit the accused under section 478, if the case should be tried by the Sessions Court. This section seems to require that action should be taken in the course of the judicial proceeding in which the offence was committed. It suggests then that the same view should be taken of section 476. If it is open to the Court at any time to proceed under section 476 it could only be for the reason that when a Court is satisfied of the probable commission of an offence, the suspected person should not be allowed to escape an enquiry or trial if no private prosecutor appears. If this is the true reason why should the operation of section 476 be confined to the offences referred to in section 195 and not extended to the cases of graver offences that may be brought to the notice of the Court?

Once the case is over in which this offence is committed or brought to its notice, that Court, except with reference to complaint or sanction, is on the same footing as any other Court. With reference to complaint it is only necessary to see whether there ought to be any investigation. With reference to sanction, there would be an applicant to put forward his case which may be met by the suspected person and the Court will be enabled to come to a conclusion whose soundness may be tested by appeal.

But when a Court takes up the case sometime after, it acts really as a prosecutor placing the person proceeded against in a disadvantageous position without the safeguard of an appeal, while there is no guarantee of an opinion formed after consideration of all the facts, which exists in the case of action taken at the time. I can see therefore no reason why a Court in those circumstances should be called upon to undertake any investigation or inquiry instead of leaving it to the properly constituted authorities.

Further I agree with the learned Chief Justice of Calcutta that it is difficult to see any necessity for section 195 if the

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suggested interpretation of section 476 is right. If the magistracy, the police, the private prosecutor are all of them unwilling to apply for sanction, it is futile for any Court to send a case under section 476 for inquiry or trial to a First-class Magistrate.

For these reasons I am of opinion that the order of the District Judge was made without jurisdiction.

PINHEY, J.—The question is whether the case of *Rahimadulla Sahib* v. *Emperor*(1) was rightly decided.

The decision in question is that of a Full Bench and followed the *dicta* of the Full Bench in *Begu Singh* v. *Emperor*(2), but we have been asked to reconsider it in the light of the recent Bombay decision, *In re Lakshmidas Lalji*(3), which dissents from the Calcutta decision.

The principle of the Madras decision was that an order under section 476 Criminal Procedure Code, should be made either at the close of the trial or proceedings to which it relates or so shortly thereafter that it may reasonably be said to form a part of those proceedings.

It may be admitted that the language of section 476, Criminal Procedure Code, contains no express limitation in these terms, and that the view now taken of the scope of that section is somewhat novel, but I am none the less of opinion that it is correct.

The chief argument urged by those who take a contrary view is that serious failures of justice may ensure if this interpretation is affirmed. It is a singular fact that both Miller, J., of this Court—the dissenting Judge in *Rahimadulla's* case(1) and Chandavarkar, J., of Bombay, failed in their attempt to illustrate the sort of failures of justice that might occur. If the illustrations given by the two Judges I have named are scrutinized it will appear that in each case the fact has been overlooked that action under section 476, Criminal Procedure Code, could be taken by the Court in which the offence was subsequently brought to light.

It is however an error to suppose that there is no remedy open to a Court if section 476, Criminal Procedure Code, cannot be made use of. Section 195, Criminal Procedure Code, affords a remedy without the necessity of granting sanction to a *private party*. Under section 195, Criminal Procedure Code, a sanction can be

(1) (1908) I.L.R., 31 Mad., 140. (2) (1907) I.L.R., 34 Calc., 551.
(3) (1908) I.L. R., 32 Bom., 184.

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granted as easily to the Public Prosecutor or any other official deputed by the District Magistrate to obtain it; and the District Magistrate can be moved to take action in the matter in a variety of ways if the case is one deserving *his* attention.

I have no doubt that the decision of the Full Bench in *Ishri Prasad* v. *Sham Lal*(1) was perfectly correct, that section 195, Criminal Procedure Code, and section 476, Criminal Procedure Code, must be read together, and that section 476, Criminal Procedure Code, prescribes the procedure to be adopted by a Court when making a complaint: but this does not appear to effect the question before us which is what latitude the Legislature intended to afford to Courts *as complainants*. I am of opinion that it was the intention of the Legislature to restrict their power in the direction and only to suffer it when promptly exercised.

The Judges who have made this reference are of opinion that on the facts the present case cannot be distinguished from the case of *Rahimadulla Sahib*(2). In my opinion that is by no means clear. The District Judge of Tinnevelly concluded the proceedings under the Land Acquisition Act on the 8th October and sent notice "*suo motu*" to the accused (to show cause why he should not be prosecuted) on the 29th October.

From the observation that the record does not disclose any reason for the delay of three weeks in issuing the notice I conclude that no explanation was called for from the District Judge. Seeing that the view now taken of a Court's power under section 476, Criminal Procedure Code, is somewhat novel, and that the report of the decision in *Rahimadulla Sahib's* case(2) was not before the District Judge at the time that he passed his order, it is possible that the District Judge was not aware that any explanation of the delay was necessary on his part. It is not impossible that the District Judge did express his intention of taking action as early as 8th October or earlier, and that he devoted the three weeks that elapsed before sending notice to the accused in making enquiries. Section 476, Criminal Procedure Code, contemplates the possibility of enquiry being necessary and does not require that notice should be given to the accused to attend during such enquiry. If such be the explanation of the delay it might reasonably be held that the proceedings taken by the Judge under section 476,

(1) (1885) I.L.R., 7 All., 871. (2) (1908) I.L.R., 31 Mad., 140.

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Criminal Procedure Code, were in fact a continuation of the former proceedings under the Land Acquisition Act.

I do not interpret the decision in the case of *Rahimadulla Sahib*(1) to mean that the final order under section 476, Criminal Procedure Code, must issue at once. What I understand by that decision is that the Court must commence to take action under section 476, Criminal Procedure Code, promptly. The final order may possibly be delayed by necessary enquiries for some time.

My reply therefore to the reference must be that the principle of the decision in *Rahimadulla Sahib* was correct, and that I am unable on the facts set forth to state whether the District Judge acted without jurisdiction in the present instance.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Sankaran-Nair.

1908. August 25, 26, 27. September 2, 9, 22.

VENKATACHELLA CHETTIAR AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

SAMPATHU CHETTIAR AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Evidence Act, Act I of 1872, ss. 123, 124, 162—Income-tax Act, II of 1886, s. 38 and rule 15—Statements made before income-tax officer not privileged under s. 123 or 124 of the Evidence Act—And not exempt from disclosure by s. 38 of the Income-tax Act and rule 15 of the rules.

Statements made and documents produced by assessees before income-tax officers for the purpose of showing the income of such assessees do not refer to matters of State, and are not privileged under section 123 of the Indian Evidence Act. The Collector, when summoned to produce such documents by the Court, is bound to produce them, and the Court is empowered under section 162 of the Evidence Act to inspect them to decide on the validity of any objection to their admissibility in evidence.

Section 38 of the Income-tax Act and rule 15 of the rules framed thereunder only forbid public servants to make public or disclose any information contained

(1) (1908) I.L.R., 31 Mad., 140.

* Original Side Appeal No. 25 of 1907.

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in such documents. The prohibition, however, does not extend to evidence given in Courts of Justice.

Under the Income-tax Act the Collector can compel the production of documents and attendance of witnesses. Documents produced and statements made under process of law cannot be said to be made in 'official confidence' within the meaning of section 124 of the Evidence Act and they are not privileged under that section.

Lee v. *Birrell*, (1813, 3 Camp., 337), referred to.

Jadobram Dey v. *Bulloram Dey*, (1899, I.L.R., 26 Calc., 281), referred to.

In re Joseph Hargreaves, (1900, I.Ch., 347), distinguished.

APPEAL from the judgment and decree of Mr. Justice Boddam in Civil Suit No. 64 of 1906.

This case is reported solely on the question whether Courts can compel the production of documents and statements produced or made by assessees before the Collector of Income-tax, and whether such documents and statements are privileged under section 123 or 124 of the Evidence Act.

The facts necessary for this report are sufficiently set out in the judgment.

The Hon. the Advocate-General, *T. V. Seshagiri Ayyar*, *V. Masilamani Pillai* and *T. V. Muthukrishna Ayyar* for appellants.

The Hon. Mr. *V. Krishnaswami Ayyar*, *V. V. Srinivasa Ayyangar* and *C. P. Ramaswami Ayyar* for first respondent.

JUDGMENT.—We are of opinion that the learned Judge is right in dismissing the suit. It is not shown that the vendees under exhibit A were trustees or purchased the property as representatives of any class of persons. There is no evidence to prove the letting to Rangiah, the grandfather of defendants Nos. 1 and 2, and his brother Ramaswami Chetti in the year 1860. There is no lease nor any accounts produced by the plaintiffs to prove any payment of rent by them till 1875 when it is alleged they were appointed trustees. The evidence of their appointment as trustees in that year is quite unreliable. The temple records have not been produced to prove any trust. In the course of the Insolvency proceedings the property was claimed by the defendants as their own and yet nothing was done to enforce the trust. It is proved on behalf of the plaintiffs that this property was excluded from partition and the defendants carried out certain festivals in this temple and certain other temples; contributions also appear to have been levied from certain shopkeepers for this purpose and it appears probable therefore that the defendants'

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share consisted of at any rate some portion, if not the whole, of the income derived from this shop. But the contributors are shown not to have formed a defined class, the festivals were uncertain, and the defendants' contribution is not shown to have been a certain or ascertainable amount, for enforcement of payments. On this evidence therefore we are unable to hold that there was any trust which could be enforced by the plaintiffs or at their instance or that the defendants are trustees. It was then argued before us that the learned Judge was wrong in declining to admit in evidence certain statements alleged to have been made by one of the defendants in respect of the plaint property during certain inquiries before the Income-tax Deputy Collector. The Deputy Collector was summoned to produce the documents in appeal, and the Advocate-General represented to us that under instructions from the Local Government the Deputy Collector declines to produce them. He contends that, under section 38 of the Income-tax Act and rule 15 of the rules framed by the Government of India with reference thereto, the Collector is prevented from disclosing the particulars of those documents, and that they are communications made to the Collector in official confidence the disclosure of which in his opinion would be prejudicial to public interests, and that they are therefore inadmissible under section 124 of the Indian Evidence Act. It was also contended before Mr. Justice Boddam that they related to affairs of State and were therefore inadmissible under section 123 of the Evidence Act. As the question is one of general importance and the Advocate-General desires to obtain an authoritative ruling on the point, we proceed to give our reasons for our conclusions. Section 162 of the Indian Evidence Act runs thus:—"A witness summoned to produce a document shall, if it is in his possession or power, bring it to Court notwithstanding any objection which there may be to its production or to its admissibility." The words are quite clear and the Deputy Collector is bound to attend with the documents. He was therefore wrong in declining to bring them to Court. Having brought them to Court, he is entitled to raise his objections to their production or admissibility, and under the same section "the validity of any such objection shall be decided on by the Court" and for the purpose of deciding on the validity of the reason that may be offered for withholding them, the Court may receive evidence. The returns submitted to an Income-tax

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Collector, any statements made before him or any orders that may be made by him do not refer to matters of State and neither the Advocate-General nor Mr. V. Krishnaswami Ayyar on behalf of the defendants has contended that they are exempt from production under the terms of section 123 of the Indian Evidence Act. Under the same section, *i.e.*, 162, besides taking evidence to decide the question of admissibility "the Court may also inspect the document unless it refers to matters of State," and as the documents aforesaid in the custody of the Income-tax Collector do not refer to matters of State the Court is also entitled to inspect them. The Collector's objection to such inspection cannot be upheld. The next question is whether they are admissible in evidence. Under section 38 of the Income-tax Act II of 1886 the Governor-General in Council may make rules for preventing any disclosure, and by rule 15 all public servants are forbidden to make public or disclose, except for the purpose of the working of the Act, any information contained in documents produced or delivered with respect to assessments under Part IV of the second schedule of the Act, *i.e.*, produced for the purpose of showing the income of the assessee. In an old case (*Lee* v. *Birrell*(1) decided in 1813, it was held by Lord Ellenborough that, notwithstanding the oath administered under the statute to a Collector of the property tax that he will not disclose anything he learns in that capacity except with their consent or by virtue of an Act of Parliament, he is bound when summoned as a witness to produce the books in his possession as there is no reference in the statute or the oath about evidence to be given in a Court of Justice and give evidence of facts within his knowledge. The learned Advocate-General contended that the decision was not right, and was opposed to the Statute itself—46 Geo. III, chap. 65, schedule (F), which contained by implication a prohibition against giving evidence in a Court of Justice except in certain cases of prosecution for perjury. But the decision has not been dissented from in the English Courts, and is treated as authoritative in the text books. The same principle was followed in 1863 by Scotland, C.J., who compelled the production of income-tax schedules, though the objection was taken by the officer who appeared (*Reg* v. *Yakatazhkam*(2) Mayne's 'Criminal Law of India,' 3rd edition, p. 91.

(1) (1813) 3 Camp., 337.

(2) (1863) 2 Mad. Sessions.

With reference to this rule itself under the Income-tax Act, Jenkins, J., took the same view following the above decisions in *Jadobram Dey* v. *Bulloram Dey*(1). The same conclusion was arrived at by Subrahmania Ayyar, J., in the recent Arbuthnot's Insolvency Proceedings when he compelled the production of income-tax returns. The case *In re Joseph Hargreaves*(2) turned upon section 115 of the Companies Act, 1862, which left it to the discretion of the Judge to order the production of certain documents including the balance sheets of the company delivered to the surveyor of taxes for the purpose of assessment of income-tax. We have no such discretion given to us under the Income-tax Act. But it was contended by the learned Advocate-General that in these decisions the effect of section 124 of the Evidence Act has not been considered. Section 124 is in these terms: "No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interests would suffer by the disclosure." We agree with the Advocate-General that once it appears that a communication to a person was made in official confidence, it is left to him and not to the Courts to decide whether public interests would suffer by the disclosure, and the Courts have no power to compel production if he considers such production prejudicial to public interests. But it is a pre-requisite that the communication must have been made to him in "official confidence," and, as already pointed out, it is left to the Court under section 162 of the Indian Evidence Act to decide the question and for that purpose it is also open to the Court to inspect the document. It was argued by the Advocate-General that the income-tax records may contain confidential matters and it is of great importance that persons should be able to be certain that any statements which may be made by them for the purpose of income-tax should in no case be disclosed, and as these statements must have been made in that belief they must be held to have been made "in official confidence" and it would not be right to insist upon the production of the documents or to receive them in evidence. In support of this argument section 28 of the Income-tax Act and rule 15 already referred to were relied upon. We are unable to accept this view. Though the cases do not refer to section 124 of the

(1) (1899) I.L.R., 26 Calc., 281 at p. 284. (2) (1900) 1 Ch., 347.

Evidence Act, they, in effect, decide that provisions of the Income-tax Act do not preclude the production of these documents in a Court of Justice, and any person therefore submitting any return could rely only upon the official not disclosing the information to other persons otherwise than in Court of Law. Further, on reading the sections of the Income-tax Act, it appears to us, that the rule 15 was intended for the guidance of the income-tax officers and not to preclude any evidence being given in a Court of Justice. The orders of the Collector under section 14 or section 26 of the Income-tax Act determining the amount of the income-tax payable it is clear, are not privileged documents under section 124 of the Indian Evidence Act as they are not communications made to him. This is a strong argument against the privilege claimed for the returns or statements on which such orders are made: under section 28 of the Income-tax Act the Collector can compel the production of documents and enforce the attendance of witnesses. It is difficult to say that documents produced or statements made under process of law can be said to be made in official confidence. They have to be made even if, in fact, no confidence is reposed in the official by the person who makes the statement. We are, therefore, of opinion that neither the provision of the Income-tax Act, nor the sections of the Evidence Act support the contention of the Advocate-General. We have accordingly called for the production of those papers. On a perusal of those documents it appears to us, however, that they do not advance the plaintiff's claim and there is nothing in those papers in any way inconsistent with the conclusion formed upon the other evidence.

We accordingly dismiss the appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Wallis.

1908. May 4. July 20.

THE OFFICIAL ASSIGNEE OF MADRAS (COUNTER-PETITIONER), APPELLANT,

v.

G. SMITH (PETITIONER), RESPONDENT.*

Insolvency—Banker and Customer—Fiduciary relationship, existence of between—Ordinary relation that of creditor and debtor—No fiduciary relationship when customer pays money to banker without special directions.

The ordinary relation between a banker and customer, in respect of moneys paid by the latter to the former, is that of debtor and creditor, and no fiduciary relationship will be created in the absence of directions by the customer which convert the banker into a trustee in respect of the sums so paid.

A trust will exist when the banker is to collect and remit, but not where he is to use and repay.

Where a customer remits money to a banker with directions to receive such money in fixed deposit for a certain period together with another sum to be remitted, the banker does not, when the latter amount is not paid, hold the former sum in trust by virtue of such direction, although he cannot claim to hold it as a fixed deposit payable only after the limited period.

In re Hallett's Estate, (1879-80, 13 Ch.D., 696), referred to.

Dale's case, (1879, 11 Ch.D., 772), referred to.

Foley v. *Hill*, (2 H.L., 28), referred to.

In re Brown Ex parte Plitt, (60 L.T. Rep., 397), referred to.

Burdick v. *Garrick*, (1869-70, 5 Ch.A., 233), referred to.

THE facts are sufficiently stated in the judgment.

D. M. C. Downing for appellant.

K. Ramanath Shenai for respondent.

JUDGMENT.—This is an appeal from a decree of the learned Chief Justice sitting as Commissioner in Insolvency.

The facts of the case are as follows:—

On the 12th October 1906 Mr. G. Smith wrote to Messrs. Arbuthnot & Co., Madras, enclosing a cheque in his favour on the National Bank of India for Rs. 627 and asked them to receive the amount in fixed deposit together with Rs. 573 which he would

* Original Side Appeal No. 1 of 1908, presented against the order and judgment of Sir Arnold White, Chief Justice, in the exercise of the jurisdiction of the Court for the Relief of Insolvent Debtors at Madras in Petition No. 181 of 1906.

remit on receiving their acknowledgment—the whole amount to be treated as a fixed deposit for one year payable to Mr. G. Smith and Mrs. F. Smith, either or survivor. On the 13th October 1906 Messrs. Arbuthnot & Co. wrote in reply acknowledging the cheque, and stating that on receipt of the further sum they would, as desired, place the total amount of Rs. 1,200 in fixed deposit for 12 months, and issue and send Mr. Smith their receipt therefor in favour of himself and Mrs. F. Smith, either or survivor. Mr. Smith did not at once remit the balance, and before he had done so, Messrs. Arbuthnot & Co. became insolvents. Mr. G. Smith now claims to be repaid the Rs. 627 out of the general assets in the hands of the Official Assignee, and his claim has been allowed by the learned Commissioner on the ground that Messrs. Arbuthnot & Co. held the Rs. 627 in a fiduciary capacity. Now, if Messrs. Arbuthnot & Co., received the sum in question in a fiduciary capacity and were under a duty to keep it separate from their own moneys and not to use it, then even though they in fact mixed it with their own moneys, it can no doubt be recovered out of the general assets of the insolvents on the principle explained by Sir George Jessel in *In re Hallett's Estate*(1), that where a person mixes money, which it was his duty to keep separate, with his own moneys and afterwards fails, the unspent balance in his hands must be taken to include the money which it was his duty to keep separate and not to use rather than the money which he had the right to dispose of. Accordingly, it was held by the Court of Appeal in that case that on the facts in *Dale's case*(2) where a cheque was sent to a bank with instructions to collect and remit the amount, and the bank collected but did not remit and afterwards failed, the proper decision would have been to allow the remitting creditor to recover the whole proceeds of the cheque out of the general assets and that the actual decision in that case was wrong. Similarly, in *In re Brown Ex parte Plitt*(3) where a banker was instructed to collect a cheque and hold the proceeds on trust and the bank failed, it was held that the full amount of the cheque was recoverable out of the general assets. It must, however, be borne in mind in considering this case that a banker who receives money as a trustee is not

(1) (1879-80) 13 Ch.D., 696. (2) (1879) 11 Ch.D., 772.
(3) 60 L.T.R., 397.

entitled to mix it with his own and use it, and this is why it is in accordance with the principle explained in *In re Hallett's Estate*(1). In *Foley* v. *Hill*(2), Lord Brougham, at page 44, points out that, if a banker were a trustee he could not use the trust money as his own without a breach of trust, and in *The South Australian Insurance Company* v. *Randell*(3) it was held by the Judicial Committee to be an indelible principle of trust property that a trustee can never make use of it for his own benefit. Mr. Heber Hart in his book on 'Banking,' 2nd edition, page 485, quotes Cane, J., who decided *In re Brown Ex parte Plitt*(4) as having observed during the argument "where the debtor (the banker) is to collect and remit, there is confidence and trust. Where the debtor is to use and repay on demand there is no trust." The question in the present case appears to resolve itself into this. Upon what terms did Messrs. Arbuthnot & Co. hold the Rs. 627 collected by them pending the receipt of the balance when the whole sum was to be placed on fixed deposit.

We think the case must be dealt with as the learned Commissioner has dealt with it on the footing that Messrs. Arbuthnot & Co. mixed the proceeds of the cheque with their own moneys, as there is no evidence to the contrary, and the statement made by the Official Assignee at the hearing that the proceeds were carried to a suspense account is not in any way inconsistent with such a mixing. We also agree with the learned Commissioner that this sum of Rs. 627 cannot be regarded as having been placed in fixed deposit so as to disentitle Mr. Smith to withdraw it before the expiry of the fixed period or to enable him to claim interest on it; but does it follow that because it was not held by Messrs. Arbuthnot & Co. on fixed deposit, they were not entitled to use it as their own, but were under a duty to keep it separate from their own moneys until they received the balance and placed the whole sum on fixed deposit so as to render the doctrine of *In re Hallett's Estate*(1) applicable? The learned Commissioner has in effect answered this question in the affirmative by finding that this money was held by Messrs. Arbuthnot & Co. in a fiduciary character, and not in such circumstances as to give rise to the ordinary relation between

(1) (1879-80) 13 Ch.D., 696.
(2) 2 H.L., 28.
(3) (1869-71) 3 P.C., 101.
(4) 60 L.T.R., 397.

banker and customer. Now, it is to be observed that Mr. Smith's letter of 12th October 1906 says nothing as to the manner in which the proceeds of the cheque were to be dealt with after collection, pending the remittance of the balance to make up the Rs. 1,200. After that time it was, of course, to be used by Messrs. Arbuthnot & Co. as their own; but even before that time it is contended for the appellant on the authority of *Foley* v. *Hill*(1), that Messrs. Arbuthnot & Co. were entitled to use it and that the relations of Mr. Smith and Messrs. Arbuthnot & Co. in respect to it were merely those of debtor and creditor. In that case, Lord Cottenham, L.C., says "money, when paid into a bank, ceases altogether to be the money of the principal; it is then the money of the banker, who is bound to return an equivalent by paying a similar sum to that deposited with him when he is asked for it. The money paid into the banker's, is money known by the principal to be placed there for the purpose of being under the control of the banker; it is then the banker's money." In an earlier case (*Devaynes* v. *Noble. Slech's Case*(2)), Sir William Grant, M.R., had laid it down, generally, that money paid into a banker's becomes immediately a part of his general assets and he is merely a debtor for the amount; and in the later case of *Burdick* v. *Garrick*(3), Lord Hatherley, L.C., after citing *Foley* v. *Hill*(1) observes "a mere banker who takes charge of his customer's money is not in any fiduciary relation whatever to him with respect to the particular coins or notes deposited, because it is the ordinary course of trade to make use of them for his own profit. He does make use of them, and he invests the money deposited with him, and his customer does not require from him those very coins or exchequer bills which he deposited with him." The effect of these authorities which are not referred to in the learned Commissioner's judgment is, if we understand them rightly, that in the ordinary course of his trade a banker is entitled to use moneys paid into his bank as his own unless, of course, there is what amounts to a direction to the contrary as in the two cases referred to in the learned Commissioner's judgment. We cannot find any such direction in Mr. Smith's letter of the 12th October 1906, which merely says "I request you will be good enough to receive the

(1) 2 H.L., 28.
(2) 1 Mer., 530 at p. 568.
(3) (1869-70) 5 Ch.A., 233 at p. 240.

BENSON AND WALLIS, JJ.

OFFICIAL ASSIGNEE OF MADRAS v. SMITH.

amount in fixed deposit together with Rs. 573 which I shall remit no sooner I receive an acknowledgment for the enclosed." Under these circumstances, we are constrained with great respect to differ from the conclusions arrived at by the learned Commissioner that the money in question were held by Messrs. Arbuthnot & Co. in a fiduciary capacity and we must set aside the learned Commissioner's order and dismiss the application. We also set aside the order as to costs but do not consider it necessary to make any fresh order.

Messrs. *King, Josselyn & Walter*—Attorneys for appellant.

C. Aijiaragavalu Naidu—Attorney for respondent.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Pinhey.

1908. September 10, 11.

GOVINDASAMY PILLAI (THIRD DEFENDANT), APPELLANT,

v.

RAMASAWMY PILLAI AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Limitation Act XV of 1877, s II, art. 91—Where sale tainted by fraud, property not recoverable if sale not avoided within period—Such sale, if intended to be operative not void ab initio.

A sale of property for consideration, intended to be operative between the parties, is not void *ab initio*, even though the transaction is brought about by fraud. Subsequent failure of consideration, in consequence of the purchaser refusing to perform his part of the promise, will only make the sale voidable. The title passes to the purchaser by such sale, and the vendor or those claiming to recover on his title must get the sale avoided within the period prescribed by article 91, schedule II of the Limitation Act, before they can recover.

Sundaram v. *Sithammal*, (1893, I.L.R., 16 Mad., 311), distinguished.

Janki Kunwar v. *Ajit Singh*, (1888, I.L.R., 15 Calc., 58 at page 65), followed.

Nabab Mir Sayad Alam Khan v. *Yasin Khan*, (1893, I.L.R., 17 Bom., 755), not followed.

SECOND APPEAL against the decree of I. L. Narayana Row, Additional Subordinate Judge of Tanjore, in Appeal Suit No. 59 of 1905, presented against the decree of T. S. Gnaniyar Nadar, District Munsif of Tanjore, in Original Suit No. 559 of 1903. Suit for a declaration. The house mentioned in the plaint

* Second Appeal No. 1322 of 1905.

MILLER AND PINHEY, JJ.

GOVINDASAMY PILLAI v. RAMASAWMY PILLAI.

belonged to one Sampuranathammal. She executed a sale-deed with reference to it, on 25th August 1897, in favour of the first defendant. The plaintiff alleged that Sampuranathammal executed the sale-deed, and also gave some money and moveables to the first defendant in consideration of the first defendant's undertaking to maintain her till her death, and that she did not give up possession of the house. As he failed to maintain her Sampuranathammal instituted a suit regarding all the properties but withdrew that portion of the claim which related to the plaint house with liberty to bring a fresh suit; that she obtained a decree in her favour regarding the moveables and the money; and that she then executed a will in favour of the second defendant, her sister's daughter to whom she gave all her properties. The plaintiff obtained a Small Cause decree in the Tanjore Sub-Court against the assets of Sampuranathammal, and, in execution of it, attached the plaint house. The first defendant claimed the house and his claim was allowed. The plaintiff in this suit sought to set aside that order and obtain a declaration that the house was liable to be sold in execution of his decree. It was alleged by the plaintiff that the sale in the first defendant's favor was without consideration as the first defendant failed to maintain Sampuranathammal and that the first defendant was not entitled to the house. The third defendant who purchased the house from the first defendant was subsequently made a party.

The District Munsif held that the suit was barred by limitation under article 91, schedule II of the Limitation Act. The material portion of his judgment is as follows :—

"It is stated that Sampuranam's right to the house is time-barred, as she did not bring a suit for the cancellation of the sale-deed within three years, and therefore the plaintiff is not entitled to proceed against the house. The plaintiff states that her right is not time-barred as she could have instituted a suit for the recovery of the house within twelve years. He relies on *Sundaram* v. *Sithammal*(1). This suit was brought more than six years after the execution of the sale-deed. In *Sundaram* v. *Sithammal*(1) a sale-deed was fraudulently obtained without consideration from a weak minded person, and it was held that as the sale was void, there

(1) (1893) I.L.R., 16 Mad., 311.

was no necessity for getting the sale set aside, and a suit could be brought within twelve years for the recovery of the property sold. Here, the sale was not void, and there was no fraud on the part of the first defendant. Even if he failed to maintain Sampuranam as he promised to do, the sale was not void; and very likely Sampuranam was not quite satisfied with the treatment she received in the first defendant's house and she returned to Tanjore. I do not think the first defendant failed to maintain her. She should have brought a suit to cancel the sale-deed but she did not do so within six years. In my opinion, Sampuranam's right to the house is barred by limitation and the plaintiff's suit fails in consequence."

The Subordinate Judge on appeal reversed the decree holding that the sale to the first defendant was void *ab initio*. The material portion of his judgment is as follows:—

"There was grave fraud of the worst possible type underlying the transaction of which the execution of the sale-deed for the plaint house formed a part. There was no payment in cash for the sale as observed by the District Munsif, and no possession was given to the first defendant as admitted by himself. Under such state of things the sale-deed was a nullity from its inception and void *ab initio*."

"It is contended on behalf of the third respondent that as Sampurana did not obtain the cancelment of the sale-deed, Exhibit I, the vendee—first defendant's right remained unaffected. No doubt the period allowed by law to launch a claim to set aside Exhibit I has long passed and gone, the time being three years, and running from the date of the execution of the sale-deed itself. But as Sampuranam was admittedly in the possession of the house, she would hardly care much whether the sale-deed was cancelled for fraud or not. In a suit for possession it was held, in 16 Madras at page 314, that article 91 simply describes the suit to which it is applicable as one in which the relief claimed is the cancellation of the impeached document and does not in terms apply to a suit for possession "in which an averment "regarding an outstanding instrument is made by way of con- "fession and avoidance in order to prevent the defendant from "setting it up as an answer to the claim." It will be thus seen that the cancellation of the instrument, Exhibit I, under the circumstances of this case is not an essential part of the relief now

claimed. The cases where fraud and undue influence have been set up to vitiate an instrument, and where no consideration was paid and no possession given are exceptions to the general rule that when a person seeks to recover property against an instrument executed by himself, he must first obtain the cancellation of the instrument."

The third defendant appealed to the High Court.

T. R. Venkatarama Sastri for appellant.

G. S. Ramachendra Ayyar for first respondent.

JUDGMENT.—Although in paragraph 3 (*g*) of the plaint the plaintiff alleges that the sale by Sampuranam was without consideration, yet in clause (*b*) of the same paragraph he sets out consideration. It is contended on his behalf that he is a stranger, but we must take his allegation in the plaint as the basis of the suit. The District Munsif finds that there was consideration for the sale though not the consideration recited in the deed, and though the Subordinate Judge holds the deed to be void *ab initio* he does not anywhere find that the parties to it did not at its date intend it to be operative. Nor does he find that it was without consideration but only as we understand him that the first defendant subsequently repudiated his agreement. In these circumstances his finding that the deed is void *ab initio* is wrong in law.

It may be that the widow was entitled to set aside the sale, and that was her view of the matter for she instituted a suit for that purpose, but, to meet an objection as to misjoinder of cause of action, withdrew that part of it which related to the sale of the house with liberty to sue again. She died before she could sue again, and no suit was filed within the period of limitation.

The present suit is to declare the property liable to attachment by the plaintiff, but the property is not liable to attachment if the title passed to the first defendant by the sale by Sampuranam. On the findings of the District Munsif and the statement of facts by the Subordinate Judge we must hold that the title did pass. Reliance was placed for the respondent on *Sundaram* v. *Sithammal*(1) but the judgment of Sir Muttusami Ayyar, J., in that case proceeds on the ground that the vendor had not lost his title. We can see no reason why when the sale is voidable for

(1) (1893) I.L.R., 16 Mad., 311.

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fraud article 91 of the Limitation Act should not be applied. If the sale is not avoided it stands good and the title passes by it. It is necessary therefore for any one seeking to recover the property on the vendor's title to get the sale avoided before he can recover. Compare *Janki Kunwar* v. *Ajit Singh*(1).

The only case of all those cited for the respondent which supports him seems to be, *Nabab Mir Sayad Alam Khan* v. *Yasin Khan*(2) which followed the case of *Bhagvant Govind* v. *Kandi Valad Mahadu*(3). The latter case was however practically overruled by the Privy Council in *Malkarjun* v. *Narhari*(4). A suit to set aside the sale in the present case is now barred by limitation.

The decree of the Subordinate Judge is reversed and that of the District Munsif restored with costs here and in the lower Appellate Court.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr Justice Abdur Rahim.

1908. September 14, 18, October 8.

KARRI VENKATA REDDI (PLAINTIFF), APPELLANT,

v.

KOLLU NARASAYYA (DEFENDANT), RESPONDENT.*

Partners—Suit by one partner against another, without asking for general account when maintainable—Suit for specific performance of one term of partnership or for partial account—Waiver of grounds in lower Appellate Court.

Where under the terms of a partnership, terminable at will, between *A* and *B*, *A* is bound to hand over to *B* who furnished all the capital, all moneys or cheques received by him in the course of the partnership business, irrespective of the state of the general accounts and *A* omits to deliver to *B* one of the cheques so received, *B* can maintain a suit against *A* to compel *A* to deliver such cheque or to pay him the amount of such cheque, whether such payment be regarded as a claim for damages or for partial account.

In regard to suits by one partner against another for a partial account, the general rule, as applied in India, is that if the account is sought in respect of a

(1) (1888) I.L.R., 15 Calc., 58 at p. 65.
(2) (1893) I.L.R., 17 Bom., 755.
(3) (1890) I.L.R., 14 Bom., 279.
(4) (1901) I.L.R., 25 Bom., 337.
* Second Appeal No. 1262 of 1905.

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matter, which, though arising out of partnership business, or connected with it does not involve the taking of general accounts, the Court will as a rule give the relief applied for. It will be for the Court to determine under what circumstances it will be equitable to order a partial account, having regard to the rights of the parties under the contract. There is no rule of law now in force that a partial account can be ordered only under exceptional circumstances.

Fairthorne v. *Weston*, (67 Eng. Rep., 432), followed.

Golla Nagabhushanam v. *Kanakala Gangayya*, (1864-5, 2 M.H.C.R., 28), not followed.

Although the Court will not, as a rule, enforce a contract to enter into partnership while it remains executory, it will, when the partnership has been constituted and when the ends of justice require it, enforce by injunction the performance of particular terms, though it may be incompetent to enforce all the terms, and the partnership is terminable at will.

The development of the law in England on the point considered.

Subbarayudu v. *Adinarayudu*, (1895, I.L.R., 18 Mad., 134), referred to.

Durga Prosonno Bose v. *Raghu Nath Dass*, (1899, I.L.R., 26 Calc., 254), referred to.

A party who, in appealing from the decree of the Court of First Instance, confines himself to one only of several grounds on which such Court had decided against him, cannot, in second appeal, be heard on any of the grounds so abandoned.

SECOND APPEAL against the decree of T. Varada Rao, Additional Subordinate Judge of Gódávari at Rajahmundry, in Appeal Suit No. 325 of 1904, presented against the decree of T. A. Narasimha Chariar, District Munsif of Bhimavaram, in Original Suit No. 235 of 1904.

The plaintiff and the defendant entered into a registered agreement of partnership, dated 1st December 1901. Under this agreement, the plaintiff agreed to advance all the necessary money required by the defendant for railway contract work and to recoup himself for such advances, with interest at 1 per cent. per mensem and the defendant agreed to surrender all the cheques, etc., which he received from the Railway Company, to the plaintiff. Plaintiff alleged that the defendant received a cheque for Rs. 936 from the Madras Railway Company on 1st September 1902 and that he failed to deliver the same to the plaintiff although called upon to do so.

The plaintiff brought this suit for the recovery of the cheque or, in the alternative, for the recovery of the amount thereof.

The further facts necessary for the report are set out in the judgment.

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K. Srinivasa Ayyangar for the Hon. Mr. *V. Krishnaswami Ayyar*, *V. Ramesam*, and *P. Narayanamurthi* for appellant.

T. V. Seshagiri Ayyar for respondent.

JUDGMENT.—The parties to the suit out of which this appeal has arisen carried on business in partnership as contractors for the execution of earthworks and similar works for the Madras Railway Company under a registered deed of partnership, dated the 1st December 1901. Under the partnership articles the plaintiff Karri Venkata Reddi, who is now the appellant, was to supply the funds for carrying out any work that might be undertaken, and it was the duty of the respondent Kollu Narasayya to supervise and manage all such undertakings. The latter as the active partner would, in the first instance, receive all moneys payable to the partnership, and it is provided in paragraph 4 of the deed that whatever cheques and cash were received by him were to be immediately made over to the plaintiff, and, in the case of cheques, after they had been duly endorsed by the defendant to the plaintiff. Under no circumstances were such cheques and sums of money to be withheld from the plaintiff, and the defendant was not to cash any cheque or spend any money so received. The plaintiff instituted the suit to enforce this article in the partnership deed in respect of a cheque for Rs. 936 which the defendant received from the Madras Railway Company on account of certain work done for them by the partnership and which the defendant failed to make over to the plaintiff after making the necessary endorsement. The plaintiff's prayer was that the Court might direct the defendant to endorse the cheque in his favour and to deliver it to him or in the alternative to pay to him the amount of the cheque. One of the defendant's answers to the action was that it could not be maintained because dissolution and general accounts were not sought, and this is the question with which we are now concerned. It was further pleaded as a fact that the plaintiff, after he received the cheque, agreed that its amount should be set off against what was then due to him in respect of his share of the profits of the business, and also that as the plaintiff failed to supply funds for some other partnership undertaking as required by the agreement he was not entitled to the assistance of the Court. The last two pleas have been held to be unfounded by the Court of First Instance upon the evidence taken in the case

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and as that Court was of opinion that the action was maintainable it gave a decree to the plaintiff. The defendant thereupon appealed, but in the Appellate Court satisfied himself with questioning the decision of the Munsif only on the last mentioned point and did not object to the Munsif's findings on the other pleas. The Subordinate Judge allowed the defendant's appeal holding that the action was not maintainable and dimissed it.

Mr. K. Srinivasa Ayyangar, who appeared for the plaintiff in the second appeal, has addressed to us an able argument in its support urging that such an action as that of his client was always entertained and that at all events even if there be some doubt as to whether it could be sustained under the old technical rule of English procedure the Courts have in modern times taken a much more reasonable attitude towards all disputes between partners so that the old rule has for some time been absolete. He also contends that there is no reason why the Indian courts which are not hampered by the technicalities of old English procedure should not at the instance of one partner compel the other partner to conform to the partnership articles or relieve the injured partner against a breach of such articles. We may point out here that in this case the primary relief asked for is by way of specific performance, and the alternative relief is practically a claim for damages.

The history of the development of the English law on the point is so fully set forth in Lord Justice Lindley's work on partnership that it would be superfluous to recapitulate it here. The general rules that may be deduced from the authorities as well established may be thus stated :—

In the first place the Court will not enforce the specific performance of an executory contract to carry on business in partnership. If the partnership was meant to be determinable at will a decree to enforce the agreement would obviously be futile and if the partnership was to be for a term of years it would not be for the benefit of persons who cannot agree that they should be compelled to do business together. The second rule is that the Court generally speaking will not undertake to carry on by its own officers a business which the parties to the contract cannot themselves carry on. The reasons for this rule are as apparent as those for the first rule. The third general rule is that the Court will not order a partial account to be taken of the partnership business

if the rights of all the partners, cannot properly be adjusted without taking a general account with a view to dissolution. Even to the first and the second rule exceptions have been admitted. For instance an agreement of partnership will be specifically enforced by ordering the execution of certain formal instruments, if otherwise the injured partner would be deprived of his legal rights. So also the Court will appoint a receiver to carry on a partnership business with a view to the winding up of its affairs. The third rule as applied now-a-days leaves it to the Court to determine under what circumstances it would be equitable to order a partial account having regard to the rights of the parties under the contract (see *Jagadisa Aiyar* v. *Kuppusamy*(1), *Subbarayudu* v. *Adinarayudu*(2), *Durga Prosonno Bose* v. *Raghu Nath Dass*(3)). It may be taken generally that if the account sought is in respect of a matter which though arising out of the partnership business or connected with it does not involve the taking of general accounts the Court will as a rule give the relief asked for, and will now-a-days refuse to interfere only in those cases in which a partial account would work injustice to the other partner.

It has never been a hard and fast rule that the Court will not interfere in a dispute between the partners, simply because the dispute relates to a matter connected with the partnership business; and, apart from any technical rules relating to the form of action, the grounds for non-interference would seem to be co-extensive with the inability of the Court to give any effective relief, or the inexpediency of giving the relief sought having regard to the essential characteristics of a contract of partnership and the justice of the case.

As regards the specific relief which the plaintiff seeks in this suit the law on the point is thus laid down in Lord Justice Fry's book on Specific Performance on page 363 of the 4th Edition :—

"The Court will not, generally speaking, enforce a contract to enter into a partnership whilst it remains executory; but nevertheless, when the partnership has been constituted, the Court will by injunction enforce the performance of particular terms, though it may be incompetent to enforce all the terms : *this is the common course of practice in the Court.*" The only objection that can be

(1) (1905) 15 M.L.J., 142. (2) (1895) I.L.R., 18 Mad., 134.
(3) (1899) I.L.R., 26 Calc., 254.

urged to the practice is that it would involve the Court's interference on every occasion when one partner refuses to conform to a partnership article, but the answer to that is best given in the words of Sir John Leach, M.R., in *Richards* v. *Davies*(1), when he was pressed with the same argument on behalf of a partner who refused to render account of a certain partnership transaction, because dissolution was not asked for :—"What right has the defendant to complain of such new bill if he repeats the injustice of withholding what is due to the plaintiff?" It need hardly be pointed out that to enforce a particular term of a partnership or to restrain its breach is not substantially open to the same objections as enforcing the performance of a contract to carry on a partnership business. We were at first inclined to think that there was a serious objection to the enforcement of a particular article in case of a partnership terminable at will as is the case here. But, after consideration, we think the following observations of Lord Justice Lindley are applicable to the present case. He says in his book at page 570 :—"Where the partnership is determinable at will, there is, it is said, more difficulty in interfering if a dissolution is not sought; for, supposing the Court to interfere, the defendant may immediately dissolve the partnership. But supposing him to do so, an injunction will not necessarily be futile, inasmuch as so long as it continues in force the defendant is rendered powerless for evil, and a notice by him to dissolve the partnership cannot *per se*, operate as a dissolution of the injunction." In view of what has been said as to the plaintiff's right to specific performance it becomes hardly necessary to say anything about the alternative prayer, because, as appears from the record, the cheque for Rs. 936 has not been cashed by the defendant. But as the question has been exhaustively argued at the bar it seems advisable to deal with it. Whether the alternative remedy be regarded as a claim for damages or for a partial account as contended for by the learned vakil for the respondent, in either view there appears to be no reason why the Court should not grant the relief asked for. Under the partnership deed the defendant was in any event bound to hand over the cheque to the plaintiff without reference to the state of the partnership accounts. The plaintiff supplied all the funds with which the business was carried on and

(1) 39 Eng. Rep., 427 at p. 428.

it is quite reasonable that he should have provided for the safe guarding of his money as he has done in clear and explicit terms. In a case like this if the Court were to refuse to interfere until the partnership was dissolved the plaintiff might be subjected to serious loss, as the effect might be that the plaintiff would remain under an obligation according to the terms of the contract to go on supplying funds in order to complete the works already undertaken, whilst the defendant who did not bring in any capital would be able to appropriate to his own use all the moneys coming in—may be large sums—and it may turn out that he has no means to repay them in case the accounts are found to be against him. It is certainly equitable, perhaps necessary, in this case that the plaintiff should be given the relief he wants, unless there is a rule of law which stands in the way of granting such relief. We have already indicated that there is no such rule of law now in force, and the statement of Wigram, V.C., in *Fairthorne* v. *Weston*(1) leaves no doubt on the point. He says at page 434 that there is no such universal rule of law at the present day, and he adds that it is essential to justice that no such universal rule should be sustained. The authority of Holloway, J., in *Golla Nagabhushanam* v. *Kanakala Gangayya*(2) has however been relied on to the contrary. No doubt that learned Judge seemed to think that the old rule was still in force and that a partial account could be ordered only in exceptional circumstances. With the greatest respect due to so distinguished a Judge we are inclined to adopt *Wigram, V.C.'s* proposition as more correctly stating the law. If there be no such rule, then Holloway, J.'s *dictum* that the exceptions to the rule should not be extended, has obviously no force. But we fail to see why further exceptions should not be admitted to the rule, supposing one to exist, if the exigencies of a particular case require it. The cases of *Musumat Soonder Bebee* v. *Khilloo Mull* and *another*(3), *Virdachala Naltan* v. *Ramaswami Nayakkan*(4) and *Chunder Sikhur Biswas* v. *Ram Buksh Chellungee*(5) are all practically open to the same criticism.

We would therefore reverse the judgment of the lower Appellate Court and restore that of the Munsif. It has been

(1) 67 Eng. Rep., 432.
(2) (1864-65) 2 M.H.C.R., 28.
(3) (1870) 2 N.-W.P.H. Ct. Rep., 90.
(4) (1862-63) 1 M.H.C.R., 341.
(5) (1878) 1 C.L.R., 545.

suggested by Mr. Seshagiri Aiyar who appeared for the respondent that in case we should hold that the suit is maintainable we should give him an opportunity of meeting the appellant's case on the other pleas on which the lower Appellate Court has come to no finding. But the findings on these points of the Original Court were not challenged, and the defendant chose to rest his case in appeal on the question of law which was argued before us. We do not think we ought to accede to the respondent's prayer.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

PALANI CHETTY (PLAINTIFF), APPELLANT,

1908. September 8, 9, 29.

v.

RANGIADOSS NAIDU (DEFENDANT), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, *ss.* 562, 578—*Remand contrary to the provisions of s.* 562 *illegal and not merely irregular—Failure to appeal against an illegal order of remand not a waiver of the illegality.*

The Court of First Instance passed a decree in favour of plaintiff on the strength of a plan which was not disputed by the defendant. On appeal, the Appellate Court held that the plan was unsatisfactory and that a proper plan was necessary for a right decision of the suit and remanded the suit for re-trial under section 562 of the Code of Civil Procedure. No appeal was preferred by plaintiff under section 588, Civil Procedure Code, against the order of remand and the lower Court again passed a decree in favour of the plaintiff which was reversed on appeal. Plaintiff preferred a second appeal to the High Court:

Held: (1) That the original order of remand was contrary to the provisions of section 562 of the Code of Civil Procedure, as the Court of First Instance had not decided the suit on a preliminary point within the meaning of the section.

(2) That such order was not merely irregular but illegal, and could not be validated by section 578 of the Code of Civil Procedure.

(3) That even if such illegal order might be validated by consent or waiver, neither the omission of the plaintiff to appeal under section 588 nor his acquiescing in the trial on remand amounted to such consent or waiver.

Subramania Ayyar v. *King-Emperor*, [(1902) I.L.R., 25 Mad., 61], referred to.

Manager of the Court of Wards, Kalahasti Estate v. *Ramasawmi Reddi*, [(1905) I.L.R., 28 Mad., 437], referred to.

* Second Appeal No. 971 of 1905.

MUNRO AND ABDUR RAHIM, JJ.

PALANI CHETTY v. RANGIADOSS NAIDU.

SECOND APPEAL against the decree of J. Hewetson, District Judge of Trichinopoly, in Appeal Suit No. 175 of 1904, presented against the decree of S. Doraiswami Aiyar, District Munsif of Trichinopoly, in Original Suit No. 336 of 1905.

The facts are sufficiently set out in judgment.

K. Jagannatha Ayyar for *K. Balamukunda Ayyar* for appellant.

V. Purushotha Ayyar for The Hon. The Advocate-General for respondent.

JUDGMENT.—One of the grounds taken in this appeal is that the order of remand by the District Judge, dated the 23rd February 1903, passed in Appeal No. 48 of 1902, was illegal. The suit was for a declaration of title to three plots of land and for an injunction. The plaintiff filed a plan (exhibit A). No exception to this plan seems to have been taken by the defendant before the District Munsif. The plaintiff got a decree. On appeal the District Judge held that the plan (exhibit A) was most unsatisfactory, and that, for the decision of the suit, it was necessary to have a proper plan prepared. He therefore remanded the suit for re-trial under section 562 of the Civil Procedure Code. The District Munsif again gave a decree for the plaintiff. The District Judge reversed that decree and hence this second appeal.

The order of remand was clearly illegal, for the District Munsif had disposed of the suit not on a preliminary point but on the merits. If the District Judge required a better plan he could have called for it himself, and then dealt with the evidence with reference to the new plan.

It is clear however that the appellant was in no way prejudiced by the order of remand, and it is therefore argued that, with reference to the provisions of section 578, Civil Procedure Code, we should not interfere. In *Subba Sastri* v. *Balachandra Sastri*(1), where it was held in second appeal that the order of remand was illegal, all the proceedings subsequent to the order of remand were set aside. Section 578, Civil Procedure Code, was not referred to. In *Mallikarjuna* v. *Pathaneni*(2), it was held that the order of remand was *ultra vires* and illegal. There are however observations to the effect that if the merits of the case

(1) (1895) I.L.R., 18 Mad., 421. (2) (1896) I.L.R., 19 Mad., 479.

MUNRO AND ABDUR RAHIM, JJ.

PALANI CETTY v. RANGIADOSS NAIDU.

were not affected by the remand, section 578, Civil Procedure Code, might apply. In *The Manager of the Court of Wards, Kalahasti Estate* v. *Ramasawmi Reddi*(1), it was held that a remand, contrary to the provisions of section 564, Civil Procedure Code, was not merely irregular but illegal. For this the ruling of the Judicial Committee in *Subramania Ayyar* v. *King-Emperor*(2), was relied upon. That was a case under the Criminal Procedure Code, but there are observations at page 98 of the report which show that the same view would have been taken of disobedience to an express provision of the Civil Procedure Code as to a mode of trial. The illegal remand in the present case cannot therefore be treated as a mere irregularity and section 578, Civil Procedure Code, has no application. It was held however by Subramania Ayyar, J., in *The Manager of the Court of Wards, Kalahasti Estate* v. *Ramasawmi Reddi*(1). MOORE, J., dissenting, that an illegal order of remand might be validated by consent or waiver, and it is therefore argued that we should not interfere because the plaintiff did not appeal against the order of remand or object to the District Munsif going on with the suit. As to the first of these reasons, the plaintiff had the right either to appeal under section 588 (28), Civil Procedure Code, against the order of remand, or to take the objection in second appeal. This is not disputed, and there is authority for it in *Subba Sastri* v. *Balachandra Sastri*(3). Failure to appeal under section 588 (28) cannot therefore be treated as consent or waiver. As to the second reason the plaintiff could not prevent the trial from going on. Thus, even if the view taken by Subramania Ayyar, J., be followed, the argument fails. We therefore have no alternative but to set aside the decree of the District Judge, the second decree of the District Munsif and the remand order of the District Judge and to remand the Original Appeal No. 48 of 1902 for disposal according to law. Costs will abide the event.

(1) (1905) I.L.R., 28 Mad., 437. (2) (1902) I.L.R., 25 Mad., 61.
(3) (1895) I.L.R., 18 Mad., 421.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1908. August 24, 52. September 11.

SUBBAROYA CHETTY AND OTHERS (DEFENDANTS NOS. 1, 3 AND 4), APPELLANTS,

v.

AIYASWAMI AIYAR AND ANOTHER (PLAINTIFF AND SECOND DEFENDANT), RESPONDENTS.*

Inam enfranchisement of lands farming—Enfranchisement, no resumption and fresh grant—Adverse possession, right acquired by, can be inherited or conveyed Lapse of time does not change character of estate.

Where a service inam, which consists of land and not the assessment only thereon, is enfranchised, such enfranchisement only disannexes the land from the office and converts it into ordinary property releasing the reversionary right of the Crown in the inam. It has not the effect of a resumption and fresh grant so as to affect the rights of other persons existing at the time of the enfranchisement.

Pingala Lakshmipathi v. *Bommireddipalli Chalamayya*, (1907) I.L.R., 30 Mad., 434), referred to.

A person holding property adversely for less than the statutory period, acquires, as against every one but the true owner, an interest capable of being inherited, devised and conveyed; and, where such an interest in service inam land is inherited by the widow, she takes only a widow's estate, which is not enlarged by subsequent enfranchisement; nor is it by continued possession for more than the statutory period, converted into an absolute estate. Mere lapse of time will not change the character of such estate, in the absence of evidence to show that she claimed an absolute interest in such properties.

SECOND APPEAL from the decree of A. F. Pinhey, District Judge of Madura, in Appeal Suit No. 382 of 1906 presented against the decree of R. A. Krishnaswami Aiyar, District Munsif of Dindigul, in Original Suit No. 263 of 1905. Suit to recover land.

The facts necessary for the report of this case are sufficiently set out in the judgment.

The Hon. Mr. *V. Krishnaswami Ayyar* and *T. V. Gopalaswami Mudaliar* for appellants.

T. V. Seshagiri Ayyar and *K. B. Ranganatha Ayyar* for respondents.

JUDGMENT.—The suit lands were formerly service inam lands attached to the office of karnam. One Venkatasubba Aiyar who

* Second Appeal No. 1004 of 1907.

MUNRO AND ABDUR RAHIM, JJ.

SUBBAROYA CHETTY *v.* AIYASWAMI AIYAR.

held that office was dismissed in 1878, and his cousin Viswanatha Aiyar was appointed in his place. Viswanatha Aiyar got a decree for the inam but failed to get possession from Venkatasubba Aiyar. Venkatasubba Aiyar died in 1886, and thereafter his widow Sivakami was in possession till 1894, when the inam was enfranchised in her name. Sivakami continued in possession till 1902, when she sold the lands under exhibit X to the first defendant. Sivakami died in 1904. The suit is by the plaintiff as reversioner to recover the lands. The plaintiff succeeded in both the Courts below.

The points pressed in second appeal are that the lands were the absolute property of Sivakami from the date of the enfranchisement, and that, in any case, she had at the date of exhibit X acquired title by adverse possession.

As to the first point it is contended that, as the lands themselves constituted the inam, there was at the enfranchisement a resumption and fresh grant by the Government to Sivakami. This contention is opposed to the latest decisions of this Court. In *Gunnaiyan* v. *Kamachi Ayyar*(1), the suit lands, as in the present case, and not the assessment formed the emoluments of the office and it was held that the enfranchisement did not operate as a resumption and fresh grant by the Government. This was approved by the Full Bench in *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya*(2), where it was laid down, "that the enfranchisement disannexes the inam from the office, converts it into ordinary property, and releases the reversionary right of the Crown in the inam, but that it does not confer on the persons named in the title-deed any right in derogation of those possessed by other persons in the inam at the time of the enfranchisement." It follows that the title of Sivakami was in no way enlarged by the enfranchisement. If her estate at the time of the enfranchisement was that of a widow, the enfranchisement did not make it anything more.

In 1886 when her husband Venkatasubba Aiyar died, Sivakami took as his widow the interest he had in the suit property. No doubt Venkatasubba Aiyar had not acquired any title as against the true owner, as he had been in adverse possession only

(1) (1903) I.L.R., 26 Mad., 339. (2) (1907) I.L.R., 30 Mad., 434.

MUNRO AND ABDUR RAHIM, JJ.

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from 1878, but his possession gave him, as against every one but the true owner, an interest capable of being inherited, devised or conveyed—vide *Narayana Row* v. *Dharmachar*(1). In 1894, when the inam was enfranchised, the widow's estate which Sivakami took in 1886 remained a widow's estate, and the enfranchisement did not convert into her absolute property.

As to the second point there is no foundation for the contention that Sivakami had obtained an absolute right to the property by adverse possession in 1902 when she executed exhibit X. It is not shown how her original widow's estate changed into something else. Mere lapse of time would not change the character of that estate. In exhibit XVII, dated the 16th October 1893, and in exhibit XIII, dated the 8th March 1901, Sivakami referred to the suit properties as the properties which she acquired from her husband and which she had been enjoying with patta in her name. In exhibit X, the only other document to which we have been referred, Sivakami, no doubt, said she had been enjoying with absolute right, but we are not referred to any evidence that she ever set up such a right to the properties before, or any right other than as the widow of her husband.

We dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

1908. September 29.

GURUMURTHI REDDI, MINOR BY HIS MOTHER AND NEXT FRIEND LINGAMMAL (PLAINTIFF), APPELLANT,

v.

GURAMMAL AND ANOTHER (DEFENDANTS NOS. 2 AND 4), RESPONDENTS.*

Hindu Law—Collateral succession—Property not taken from 'ancestor' does not devolve with incidents of ancestral property.

Property inherited by one from a collateral relation, as a brother, uncle, etc., is not taken as, and subject to the incidents of, ancestral property, and his male descendants are not coparceners with him in respect of such property.

* Second Appeal No. 1465 of 1905.

(1) (1903) I.L.R., 26 Mad., 514 at p. 516.

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Karuppai Nachiar v. *Sankaranarayanan Chetty*, [(1904) I.L.R., 27 Mad., 300] followed.

SECOND APPEAL against the decree of S. Gopalacharriar, District Judge of Salem, in Appeal Suit No. 26 of 1904, presented against the decree of T. Rajaram Row, District Munsif of Krishnagiri, in Original Suit No. 367 of 1902.

Suit for possession of immoveable property. The properties in dispute were allotted to the plaintiff's uncle on a division between him and plaintiff's father. The plaintiff's uncle died issueless, leaving a widow behind him who subsequently died. The father of the plaintiff survived the widow and disposed of some of the plaint properties by will to defendants Nos. 2 and 4. He died prior to suit. The defendants Nos. 1 and 3 claim to be in possession of some of the properties under an alleged gift by the plaintiff's father and defendants Nos. 2 and 4 claim the properties in their possession under the will above referred to.

As regards the gift to defendants Nos. 1 and 3 both the lower Courts held that the gift was not proved and decreed possession in favour of plaintiff of the properties held by defendants Nos. 1 and 3.

The will in favour of defendants Nos. 2 and 4 was held to be valid on the ground that the plaintiff was not a coparcener with his father in the properties taken by the latter as reversioner on the death of the widow of plaintiff's uncle. Plaintiff's suit against defendants Nos. 2 and 4 was dismissed by both Courts.

The plaintiff appealed to the High Court.

C. Madhavan Nair for appellant.

The Hon. The Advocate-General for respondents.

JUDGMENT.—We are of opinion that the property which devolved upon the plaintiff's father on the death of his brother, Gurumurthi, was the separate property of the plaintiff's father and not ancestral property. The inheritance was from a collateral relation and not from an 'ancestor.' The present case in our opinion is not governed by the judgment of the Privy Council in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(1); but by the principle of the decision of the Full Bench of this Court in *Karuppai Nachiar* v. *Sankaranarayanan Chetty & Co.*(2), where

(1) (1902) I.L.R., 25 Mad., 678. (2) (1904) I.L.R., 27 Mad., 300 at p. 311.

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it was held (page 311) that the maternal uncle from whom the inheritance devolved was not an "ancestor." The law is thus stated at page 344 of Mayne's 'Hindu Law,' seventh edition, published after the judgment of Privy Council in *Venkayyamma Garu* v. *Venkataramanayyamma Bahadur Garu*(1). "Hence all property which a man inherits from a direct male ancestor, not exceeding three degrees higher than himself, is ancestral property, and is at once held by himself, in coparcenary with his own issue. But where he has inherited from a collateral relation, as for instance from a brother, nephew, cousin or uncle, it is not ancestral property; consequently his own descendants are not coparceners in it with him."

This second appeal is dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Abdur Rahim.

1908. July 18. November 18.

ADAIKALAMMAI

v.

RAMAN.*

Penal Code, Act XLV of 1860, *ss.* 464 *and* 467—*No false document where executant simply sets up a false claim but has no intention of causing belief that document was executed by another.*

A, who was not the son, natural or adopted, of the deceased *B*, executed a deed of mortgage of certain properties of *B* in favour of *C*. In the body of the document *A* was described as the son of *B*, though no such description appeared in the signature. *A* was known to *C* for a long time, and *A* had no intention of causing it to be believed that the document was executed by any other person than himself.

Held, per MUNRO AND ABDUR RAHIM, JJ., that *A* was not guilty of making a 'false document' within the meaning of section 464, Indian Penal Code. The assertion of a false claim in a document will not constitute the document false, when it is executed by the party who purports to execute it and there is no intention of causing a belief that it was executed by some other person, real or fictitious.

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(1) (1902) I.L.R., 25 Mad., 678.

* Criminal Revision Case No. 287 of 1908.

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Per PINHEY, J.—The document was a 'false document' as it contained a false description. *A* wanted to cause it to be believed that such a person as the son of *B* existed and his intention was to defraud the real heir, *i.e.*, the widow of *B*, *A* had thus committed the offence of 'forgery' within section 467, Indian Penal Code.

CRIMINAL REVISION case preferred against the order of acquittal of C. G. Spencer, Sessions Judge of Tinnevelly, in Sessions Case No. 5 of 1908.

The facts are sufficiently stated in the judgment.

The case first came on for hearing before (Munro and Pinhey, JJ.), who delivered the following judgments:—

JUDGMENTS (MUNRO, J.).—I am of opinion that exhibit A is not a false document within the meaning of section 464 of the Indian Penal Code. The document must fall, if at all, within the first clause of the section. That clause lays down that a person makes a false document who dishonestly or fraudulently signs a document with the intention of causing it to be believed that the document was signed by a person by whom he knows it was not signed. In the present case the accused had no intention by describing himself in the document as the son of Veerana Kudumban to cause it to be believed that the document was executed by anybody other than himself. His intention was to assert or to support his claim to be the adopted son of Veerana.

I would therefore dismiss the revision petition.

As my learned brother has taken a different view, the case will have to be laid before another Judge under sections 439 and 429 of the Criminal Procedure Code.

PINHEY, J.—The Sessions Judge of Tinnevelly acquitted Rama Kudumban on a charge of forging a valuable security under section 467, Indian Penal Code. Government refused to appeal. The petitioner moved this Court by a revision petition. Mr. Justice Wallis sitting as Judge of the Admission Court doubted if the Sessions Judge had correctly expounded the law and referred the case to a Division Bench.

The facts as found by the Sessions Judge are as follows:—

One Veerana Kudumban, who owned certain separate property, died on 5th May 1906, leaving a widow—the petitioner—but no son. The widow enjoys the property and has secured *patta* in her name. On the 12th October 1907 the accused Rama Kudumban's

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son *Kothala Veeran* executed a usufructuary mortgage deed in favour of prosecution witness No. 5 for Rs. 90 by which he purported to mortgage among other items two items of the separate property of the late Veeranan. The deed is signed by Rama Kudumbam without adding the father's name, but the document itself contains an averment that it is executed by "Rama Kudumbam, son of Veeranan." It was the accused's case at the trial that he had been adopted by Veeranan, but the Sessions Judge found against the adoption. He further found that the accused was no relation to the deceased Veeranan and that the document was executed with intent to commit fraud. Apparently both the accused and the mortgagee intended to defraud the widow. The Sessions Judge has held that the offence of forgery of a valuable security was not made out, because the act of the accused did not amount to the *making of a false document* as defined in section 464, Indian Penal Code. He reasons thus:—A document is not false within the definition because it contains false statements or descriptions, and it is the essence of forgery that the signature, the seal or the date should be false; in other words that to constitute forgery the falsity must consist in the document being signed or sealed with the name or seal of a person who did not in fact sign or seal it. As the document in this case was executed by a real person in his own name and merely contains a false description inserted at or without his own suggestion it cannot be said that it was executed with the intention of causing it to be believed that it was executed by some one else who did not really execute it.

The definition of 'Forgery' in the Indian Penal Code is not as simple and clear as the definition of 'Forgery' at Common Law, and this perhaps accounts for the error into which the Sessions Judge appears to have fallen. 'Forgery' in England is not defined by Statute. Forgery at Common Law is defined by Blackstone (4 Com., 247) as "the fraudulent making (or alteration) of a *writing* to the prejudice of another man's right." There can be no doubt that the accused's act exactly fulfilled the requirements of this definition. A little consideration will, I think, show that it also falls within the definition of the Indian Penal Code. The document (exhibit A) must be considered as a whole. The signature must be read along with the false statement in the

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body of the document that the executant was the son of Veeranan. A man's signature of his own name may amount to forgery—*vide* explanation (1) to section 464, Indian Penal Code, and illustration A. We can only interpret the document as if the words "son of Veeranan" had been added to the signature. The accused executed a document purporting to deal with the property of the petitioner as if he and not the petitioner was the heir of the former owner, and suppressed his own real father's name. The false description in the document made the signature false. What the Sessions Judge calls the essence of forgery was clearly present here.

Adoption is a common practice in this country. Veeranan had no son and might have adopted one, but did not. An adopted son might have lawfully executed such a document as exhibit A. The accused executed exhibit A fraudulently in the name of a fictitious person, Veeranan's son, with the intention of causing it to be believed that such a person as Veeranan's son really existed and had executed the document though he knew that no such person existed or had executed it. He made a false document, within the definition set forth in section 464, Indian Penal Code, explanation (2). As he made the false document in order to assert or support a claim or title, and with intent to defraud Veeranan's widow he committed forgery. Exhibit A purports to be a valuable security. The act of the accused constituted an offence under section 467, Indian Penal Code.

I would set aside the order of acquittal and order a retrial.

The case again came on for hearing under sections 439 and 429 of the Code of Criminal Procedure in due course before the Bench constituted as above.

T. R. Venkatarama Sastri for complainant.

The Acting Public Prosecutor in support of the order of the Sessions Judge.

When the Court made the following judgment:—

JUDGMENT (ABDUR RAHIM, J.).—The question in this case is whether the accused by describing himself as the son of Veeranan in the body of the sale deed, which he executed by putting his mark at its foot, intended to represent that the document was executed by a fictitious person inasmuch as Veeranan had no son or by himself claiming to be the adopted son of Veeranan. If the

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facts which are proved be borne in mind, it seems to me that there is no difficulty in arriving at a conclusion. Veeranan was uncle of the accused; it is alleged by him that he was adopted by his uncle but it has been proved that that allegation is false. The person in whose favour the sale deed was executed has been examined as the fifth prosecution witness and from his evidence it appears that he knew the accused well and his family. It would be impossible in my opinion under such circumstances to say that the accused by calling himself the son of Veeranan intended to make out that he wanted it to be believed that it was not he that was executing the document but a fictitious person. True, he falsely described himself as the son of Veeranan, and though I do not say that in some circumstances a false description may not be such as to affect the identity of the person falsely described, it would be going too far to hold that whenever an executant of a document attaches a false description to his name he comes within the purview of section 464, Indian Penal Code. In this case I have no hesitation in saying that, by calling himself the son of Veeranan, the accused merely intended to put forward a claim that he was the adopted son of that man.

The acquittal of the accused in my opinion was right and there is no reason to interfere with that order.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, Mr. Justice Wallis and Mr. Justice Sankaran-Nair.

SHEIK MAHAMAD RAVUTHER (FIRST PLAINTIFF), APPELLANT,

v.

THE BRITISH INDIA STEAM NAVIGATION Co., LTD., BY ITS MANAGING AGENTS MESSRS. MACKINNON, MACKENZIE & Co., AND OTHERS (DEFENDANTS), RESPONDENTS.*

1908. February 4, 5, 6, 7. March 23. July 28. December 15.

Negligence, liability for, of carrier—Carrier liable unless exempted by clear and unambiguous words—Bill of lading, construction of—Burden of proof—Contract by carrier exempting himself from liability for negligence is legal and not void as opposed to public policy—Letters Patent, clause 15—Whole case open on appeal.

The defendants carried 4,000 bags of rice and other goods, consigned to plaintiffs from Rangoon to Tuticorin, under a bill of lading which contained, *inter alia*, the following general condition:—

"The said goods to be carried and delivered, subject to the terms and conditions hereof, including those at the foot of this bill of lading, in the like good order and condition, at the port of Tuticorin, the Act of God . . . . the Queen's enemies . . . . accidents, loss or damage from vermin . . . . accidents of sea, land . . . . of whatsoever kind, and accidents, loss or damage from any act, neglect or default of whatsoever of the pilot, master, mariners or other servants of the company excepted . . . ."

Among the conditions at the foot of the bill of lading was the following:—"The company is to have the option of delivering these goods or any part thereof, into receiving ship or landing them at the expense and risk of the shipper or the consignee, as per scale of charges to be seen at the Agent's office, and is also to be at liberty, until delivery, to store the goods in receiving ship, godown or upon any wharf, the usual charges therefor being payable by the shipper or consignee . . . . In all cases and under all circumstances the liability of the company shall cease absolutely when the goods are free of the ship's tackle and thereupon the goods shall be at the risk, for all purposes and in every respect of the shipper or consignee."

The ship arrived at Tuticorin and the defendants, under the powers reserved to them by the last recited clause, landed the cargo. In a suit brought by the consignees (plaintiffs) to recover damages caused to the goods by the negligence of defendants' servants after such goods were free of the ship's tackle and before they were delivered to plaintiffs.

* Letters Patent Appeal No. 73 of 1906.

Held, per Chief Justice and SANKARAN-NAIR, J. [*Wallis, J.*, dissenting] on the construction of the bill of lading, that the liability of the defendants at that stage was specially provided for by the last recited clause, that they could not invoke in aid the general negligence clause in the body of the document and that they were not exempted from liability for negligence.

Exemption of shipowners from liability for negligence must be provided for in clear and unambiguous terms and must not be left to inference from general words. The words "in all cases and under all circumstances" in the last clause, though as wide and general as possible, will not cover the case of negligence, which must be expressly provided for. Under the contract and the circumstances of the case, the defendants had to prove that the goods were ready for delivery before they became damaged.

Per WALLIS, J.—The bill of lading sufficiently protected the defendants from liability for negligence during the discharge of the cargo. The general condition in the bill will, by itself, limit the shipowner's liability during the whole time he was in possession of the goods and will apply during the loading and discharge of the goods. The last clause cannot be considered as imposing on the shipowner at that stage, a liability for negligence, which had been already generally stipulated for.

The artificial rule of construction laid down by Walton, J., cannot be applied where the exemption clause does not stand by itself, but occurs, in a bill of lading containing complicated stipulations, as the bill under consideration. In the latter case, the document must be considered as a whole. The last recited clause must be read with the general condition in the body of the bill and so read, clearly exempted the defendants from liability. The plaintiff's suit was not for non-delivery but for failure to deliver in proper order and condition; and the plaintiffs were bound to prove when they were delivered and also that the bags were in a bad condition at such time.

Per CHIEF JUSTICE and WALLIS, J.—In England it is competent to a shipowner to protect himself, by express contract, from liability for the negligence of himself or his servants. This is also the law applicable in India.

Per SANKARAN-NAIR, J.—The rule of English law, which allows shipowners to exempt themselves, by express contract, from liability for negligence, cannot be applied in India, as it is inconsistent with the provisions of the Indian Contract Act and the manifest intention of the Legislature in enacting such provisions.

Section 148 of the Contract Act includes bailments for carriage, and a shipowner is a bailee in respect of the goods entrusted to him.

Section 151 of the Act lays down the absolute minimum of care required of bailees. Having regard to the provision of section 152, which allows a bailee to undertake a higher responsibility, and to the absence of provisions allowing a bailee to limit such liability, the amount of care required by section 151 is irreducible by any contract between the parties.

A contract limiting such liability will be opposed to public policy and void under section 23 of the Contract Act, as it will be against the interests of the mercantile community and not necessary in the interests of the shipowners.

Price & Co. v. *Union Lighterage Company*, [(1903) 1 K.B., 750], referred to.

Rathbone Brothers & Co. v. *MacIver Sons & Co.*, [(1903) 2 K.B., 378], referred to,

Nelson Line (Liverpool) Limited v. *James Nelson & Sons, Limited*, [(1908) A.C., 16], referred to.

Jellicoe v. *The British India Steam Navigation Company*, [(1884) I.L.R., 10 Calc., 489], referred to.

The Irrawady Flotilla Company v. *Bugwandas*, [(1891) I.L.R., 18 Calc., 620], referred to.

Per Curiam: In an appeal under clause 15 of the Letters Patent from the judgments of two Judges who have differed in opinion, the appeal is not confined to the point on which the learned Judges differed and the whole case is open on the appeal.

Kunhunni v. *Sri Vallabhan*, [(1901) 11 M.L.J., 10], followed.

APPEAL under section 15 of the Letters Patent against the judgment and decree of Subrahmania Ayyar and Miller, JJ., dated 5th September 1906, in Second Appeal No. 97 of 1904.

The facts necessary for this report will be found in the report of the judgment appealed against reported in I.L.R., 30 Mad., 79, and the judgment in this appeal.

P. R. Sundara Ayyar and *V. C. Seshachariar* for appellant.

C. F. Napier for respondents.

JUDGMENT (Sir ARNOLD WHITE, C.J.).—This is an appeal under article 15 of the Letters Patent, the learned Judges before whom the case came on second appeal having differed in opinion. The plaintiffs claim damages for the loss of 246 bags of rice out of a consignment of 4,000 bags carried by the defendants under a bill of lading from Rangoon to Tuticorin. These 246 bags with others were destroyed by the municipal authorities after they had been landed, on account of their damaged condition. The plaintiffs alleged the damage was occasioned by the negligence of the defendants or their agents.

The two main questions for consideration are (1) On the facts were the defendants negligent? (2) If they were, are they protected by the terms of the bill of lading? The Court of First Instance and the lower Appellate Court held that there had been no negligence on the part of the defendants. The two learned Judges of this Court who heard the case on second appeal were both of opinion that the defendants had been negligent, but they differed on the question whether they were protected by the terms of their bill of lading against liability for negligence.

The damage to the goods was caused by rain. The bags were landed in boats, and the District Judge finds there was no evidence that the cargo was put out of the ship during the rain, but that it

began to rain while the boats were between the ship and the shore. The District Judge finds, and we must accept the finding as binding on us, as a finding of fact, that the wetting received by the bags of rice between the ship and the shore would have caused no damage if the consignees had taken delivery at once. He also finds that "the damage (by rain) was caused on the foreshore, and the fact that the bags had to stay there a long time was entirely due to the negligence of the consignees, for defendants did all they could to clear the cargo quickly." I think we are bound by the finding that the defendants did all they could to clear the cargo quickly, and I deal with this question of negligence on the footing that the delay in the clearance of the goods after they had been placed on the foreshore was due to circumstances beyond the control of the defendants. The finding of the District Judge that the fact that the goods had to stay a long time on the foreshore was entirely due to the negligence of the consignees, is a finding that the delay was caused by the negligence of consignees generally, and, it seems clear from the earlier finding of the Judge, "it is impossible to say the plaintiffs were negligent," that this was not intended by the District Judge to be a finding of negligence on the part of the plaintiffs. In the second place the Judge appears to arrive at this finding as a necessary inference from the fact that the defendants did all they could to clear the cargo quickly. This seems to me to be a *non sequitur*. It does not follow that because the defendants did all they could to clear the cargo quickly, the delay in clearance was caused by the negligence of the consignees generally. Still less does it follow it was caused by the negligence of the plaintiffs. Both carriers and consignees may have done all they could in the circumstances to clear the cargo quickly. It is not suggested that the placing of the goods on the foreshore constituted delivery to the plaintiffs, or that apart from the special terms of the bill of lading the defendants' liability came to an end when they deposited the goods on the foreshore. The question therefore is, having regard to the local conditions in connection with the landing of goods at Tuticorin and the custody of goods by carriers during the interval between the placing of the goods on the foreshore, and the delivery to the consignees, and the season of the year (it is not denied that at this time of the year the "monsoon" may set in any day), the defendants were guilty of negligence in not taking precautions to protect the goods from

being damaged by rain notwithstanding the fact (as found) that they did all they could to clear them quickly.

Now the facts found or admitted are these :—The practice at the port of Tuticorin in connection with the landing of cargo from steamships is to land the cargo by boats on to the pier, unsorted, and to remove it from the pier to the foreshore and sort it there according to marks. I do not think it was suggested on behalf of the defendants that, according to the practice which prevails at Tuticorin, the carriers are prepared to give delivery until the cargo landed on the pier has been sorted on the foreshore. When sorted the goods are at the disposal of the several consignees, and if, in the present case, the defendants had been able to show that the plaintiffs' goods which became damaged by the rain were ready for delivery before they became damaged and the plaintiffs were so informed, the defendants would, in my opinion, be under no liability in respect of the damaged goods. I think since, *ex concessis*, the contract was not terminated by the deposit of the goods on the foreshore, it was for the defendants to show the plaintiffs' goods were ready for delivery at the time they were damaged and not for the plaintiffs to show they were not ready. In my opinion the case of Glendarroch(1), on which Mr. Napier relied with reference to the question of the burden of proof is not in point. According to the evidence of Mr. Mansfield, the representative of the local agents of the defendants, the circular (exhibit I) was sent to the consignees and it is not disputed that the plaintiffs amongst the other consignees received the circulars in question. The circular is in these terms (exhibit I).—"The consignees of cargo per S.S. *Thorndale* from Rangoon are hereby requested to take delivery of their cargo as it is landed each day and remove at once, as the space for landing on foreshore is very limited. Failing to take delivery at once, the cargo will be on the beach at consignees' entire risk and expense." In my opinion this notice does not relieve the defendants from liability in the absence of evidence that the defendants were in fact prepared to deliver the plaintiffs' goods. Mr. Mansfield's evidence with reference to this was as follows :—"On the 25th, bags were stacked according to marks and ready for delivery. There are no accounts showing how many bags of each mark were sorted and

(1) (1894) P. 226.

stacked on a particular day. Besides the first plaintiff's 4,000 bags there was other cargo consigned to the plaintiffs Nos. 2 and 3. I cannot say for certain whether any of the 4,000 bags were ready for delivery on the 24th or the 25th October. Our delivery book shows that 13 bags of S.K.V.S. were delivered on the 27th October. This was the first delivery in the case of the 4,000 bags. I cannot say if any more bags were ready for delivery on that day. I cannot say if any S.K.V.S. mark bags were ready for delivery before the 28th. The consignees cannot remove the bags before they take a delivery order from us which order is given when the cargo is ready for delivery. The delivery order could be given even before the steamer arrives. The consignees have only to show the bill of lading and apply for the delivery order. . . . It rained very heavily on the night of the 27th October and intermittently for some days afterwards. It rained on the day. I cannot say if it rained on the nights. The steamer will not discharge cargo when it rains. If rain sets in when boats are coming with cargo the boats continue the journey. This is what happened in the case of the landing of the bags in question. We did not provide any covering for protecting the bags from rain either on the boats or on the beach. When the heavy rain came we lent to the consignees the few tarpaulins which we had." Mr. Laporte, the former Manager of the local agents, said "I can't say whether the cargo of a particular consignee was ready for delivery on a particular day; on a reference to the books of our office, some cargo consigned to the plaintiffs Nos. 2 and 3 was ready for delivery between the 24th and 28th and was not taken delivery of, but I cannot give the marks of the cargo. I cannot say when the bags bearing the marks $\frac{S.}{K.V.S.}$ and J.K.V.S. were ready for delivery." It is not suggested on behalf of the defendants that they took any precautions to protect the goods from the rain. The reason why they did not do so seems clear from Mr. Mansfield's evidence. He stated "The nature of our liability in the matter of the cargo shipped by steamer will appear from the bill of lading. Our liability ceases as soon as the cargo has left the steamer's slings. We are not liable for any damage that may happen to the cargo after it leaves the steamer—whether in the boat or the pier or the beach. We are not bound to cover the

cargo with tarpaulin. We never covered cargo with tarpaulin, but have lent tarpaulins to our consignees when asked. We have not a large stock of tarpaulins. We have a few tarpaulins and these we keep to cover our own cargo." The figures in exhibit IV, which the learned Judge accepts, no doubt show that on October 26th, 27th and 28th, 1900, a very large number of bags had been landed and were ready for delivery, but the figures do not show and Mr. Mansfield, as I read his evidence, admitted that it could not be shown, that the plaintiffs' bags were ready for delivery at the time they were damaged by the rain. As it is not disputed that the goods were damaged by rain after they had been deposited on the foreshore, and that no precautions were taken by the defendants to prevent their being damaged by rain, and as in my opinion on the facts found and admitted, the defendants' liability in respect of the goods had not come to an end at the time the goods were damaged, I am of opinion that on the facts the defendants were negligent and are liable for the damage to the goods.

Assuming this to be so, the next question for consideration is, are the defendants protected by the terms of the bill of lading? The general condition in the bill of lading is as follows:—"The said goods to be carried and delivered subject to the terms and conditions hereof, including those at the foot of this bill of lading, in the like good order and condition, at the port of Tuticorin, the Act of God, the Queen's Enemies, Restraint of Princes, Rulers or peoples, restrictions of Quarantine, Prohibition, Pirates or Robbers by Sea or Land, accidents, loss and damage from Vermin, Barratry, Jettison, Collision, Fire, Accidents to or defects latent or otherwise in Hull, Tackle, Boilers, or Machinery, or their appurtenances, Steam, and all the perils, dangers, and accidents of the Sea, Rivers, Land Carriage, and Steam Navigation of whatsoever nature and kind; and accidents, loss or damage from any act, neglect, or default whatsoever of the Pilot, Master or Mariners, or other servants of the Company excepted, and the Company is to be at liberty to carry the said Goods to their Port of Destination by the above or other Steamer or Steamers, Ship or Ships, either belonging to the Company or to other persons, and to tranship or land and store the Goods either on shore or afloat, and re-ship and forward the same at the Company's expense but at Shippers' or Consignees' risk, and with liberty also, at the like

risk, to deviate as above-mentioned, unto K. V. S. Mohamed Ebrahim Saheb or to his or their assigns." Amongst the conditions at the foot of the bill of lading referred to above is the following :—"The Company is to have the option of delivering these Goods, or any part thereof, into receiving Ship, or landing them at the risk and expense of the Shipper or Consignee, as per scale of charges to be seen at the Agents' Offices, and is also to be at liberty until delivery to store the Goods or any part thereof, in receiving Ship, godown or upon any wharf, the usual charges therefor being payable by the Shipper or Consignee. The Company shall have a lien on all or any part of the goods against expenses incurred on the whole or any part of the shipment. In all cases and under all circumstances the liability of the Company shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the Shipper or Consignee. Fire Insurance will be covered by the Company's Agents on application."

It was contended on behalf of the appellant that the general provision in the bill of lading as to terms and conditions which purported to exempt the defendants from liability for "any act, neglect, or default whatsoever of the Pilot, Master or Mariners, or other servants of the Company" referred only to the neglect, or default of the defendants' servants engaged in or connected with the navigation of the ship. I should not be disposed to accept this construction of the words (see *Baerselman* v. *Bailey*(1)). But however this may be, it seems to me that as a matter of construction of the bill of lading, the question of the defendants' liability is governed by the terms of the special condition at the foot of the bill of lading which refers to that stage of the adventure when the goods were free of the ship's tackle. It was not contended by Mr. Napier, and having regard to the wording of the special condition it could not be contended, that the putting the goods on board a receiving ship, or landing them, or storing them, constituted delivery. The special condition clearly contemplates that the delivery is to take place, after the doing of these acts.

Now, it seems to me, the defendants cannot be heard to say that for the purpose of protecting themselves against negligence after the goods are free of the ship's tackle they are entitled to pray in

(1) (1895) 2 Q.B., 301.

aid the general conditions in the body of the bill, and give the go-by to the special condition which in terms relates to the stage of the adventure when the negligence occurred. The special conditions were inserted in the bill of lading by the defendants for their own purposes and their own protection. They contain the terms on which the defendants were prepared to carry the goods with reference to this particular stage of the adventure, and, it seems to me, the question of the liability of the defendants during this particular stage of the adventure must be governed by the special conditions with reference thereto. In fact I do not think the contrary view was seriously pressed by Mr. Napier, and in *British India Steam Navigation Company* v. *Ratansi*(1) in which I think it may be assumed the general conditions in the bill of lading were the same though the report does not say so—the point does not seem to have been put forward.

The view which I take appears to be in accordance with the decision of the Court of Appeal in *Rathbone Brothers & Co.* v. *D. MacIver Sons & Co.*(2) where the Court holding that the carriers were unable, on the facts, to claim the benefit of a special proviso relating to unseaworthiness, the carriers were held liable notwithstanding general words in the bill of lading which exempted them in the case of injury or default.

In the Bombay case to which I have referred, the suit was against the same defendants, and it would seem that the defendants have amended this bill of lading to meet the decision in that case. The first clause of the special condition in the bill of lading in the Bombay case is the same as in the present case, but in the bill of lading in the present case new provisions have been inserted in substitution for a provision which purported to impose on the consignee, where the goods were stored "all risks of fire, dacoity, vermin *or otherwise*." It was held by the Bombay High Court that the words "*or* otherwise" could not be held to cover all possible losses. The words "in all cases and under all circumstances" in the present bill of lading are no doubt as wide and as general as possible, but the reiterated use of general words does not of course exclude the application of the special canons of construction which a long course of Judicial decisions has held applicable to the construction of contracts which purport

(1) (1898) I.L.R., 22 Bom., 184. (2) (1903) 2 K.B., 378.

to relieve a carrier from liability for negligence. The authorities were discussed by Walton, J., in *Price & Co.* v. *Union Lighterage Company*(1). In that case goods were loaded on a barge under a contract for carriage by which the barge owner was exempt from liability "for any loss of or damage to goods which can be covered by insurance." The barge was sunk owing to the negligence of the servants of the barge owner, and the goods were lost. The learned Judge held that the barge owner was not protected from liability by the contract. In the course of his judgment the learned Judge observed ". . . . If it were right or permissible to deal with this case without regard to the rules of construction which have been laid down in a well-known series of cases and looking only at the language used, it might very well be said that its meaning was that the defendants were to be exempt from liability for insurable losses whether caused by negligence or not. But there is, I think, a well-established rule of construction applicable to the present case. The law of England, unlike in this respect the law of the United State of America, does not forbid the carrier to exempt himself by contract from liability for the negligence of himself and his servants; but, if the carrier desires so to exempt himself, it requires that he shall do so in express, plain, and unambiguous terms." After discussing the authorities Walton, J., summarises their effect in these words "It really comes to this, that if a carrier wishes to exempt himself from liability for the negligence of his servants he must insert in his contract, in one form or another, something equivalent to what is well known as a negligence clause." Now I understand a negligence clause to be a provision which in express terms, exempts a carrier from liability for the negligence of his servants. The specific condition in the bill of lading in the present case contains no such provision. The judgment of Walton, J., was affirmed by the Court of Appeal in *Price & Co.* v. *Union Lighterage Company*(2), Collins, M.R., observing in his judgment that the judgment of Walton, J., puts the decision of the case upon the right principle, and stated precisely the result of the authorities.

In *James Nelson & Sons, Limited* v. *Nelson Line (Liverpool), Limited*(3), Collins, M.R., again refers to the judgment of Walton,

(1) (1903) 1 K.B., 750 at p. 754. (2) (1904) 1 K.B., 412.
(3) (1907) 1 K.B., 769.

J., as containing "a complete and accurate exposition of the law." In *The Pearlmoor*(1) Gorell Barnes, J., cites a passage from the judgment of Walton, J., as summarising his own view. The passage in question is with reference to the rule laid down by Lord Bowen in *Steinman & Co.* v. *Angier Line*(2) and is as follows:—"I understand the meaning of this to be that an exemption in general words, not expressly relating to negligence, even though the words are wide enough to include loss by the negligence or default of the carrier's servants, must be construed as limiting the liability of the carrier as assurer, and not as relieving him from the duty of exercising reasonable skill and care. If the carrier desires to relieve himself from the duty of using by himself and his servants reasonable skill and care in the carriage of goods, he must do so in plain language and explicitly, and not by general words (*Price & Co.* v. *Union Lighterage Company*(3))." In *James Nelson & Sons, Limited* v. *Nelson Line (Liverpool), Limited*(4), the Court of Appeal applied the principle of Walton, J.'s decision in a case in which the clause in the bill of lading ran "the carrier not being liable for any damage or detriment to the goods which is capable of being covered by insurance or which has been wholly or in part paid for by insurance" and the plaintiffs were partially covered by insurance and had been paid the insured proportion of the loss. This case was taken to the House of Lords, (*Nelson Line (Liverpool), Limited* v. *James Nelson & Sons, Limited*(5)), and the decision of the Court of Appeal was affirmed on the ground that as there was no clear and express exemption, the shipowner was not relieved from his duty to take reasonable care. The Lord Chancellor said that if he had been obliged to affix a definite meaning to the disputed language, he would prefer the plaintiffs' construction, *i.e.*, a construction which would not exempt the defendants from liability; but he based the judgment, in which the other learned Lords concurred, on the ground that the clause taken as a whole was "so ill thought out and expressed that it was not possible to feel sure what the parties intended to stipulate," and the Lord Chancellor stated that he rested his opinion on the ground that the document was ambiguous.

(1) (1904) P. 286. (2) (1891) 1 Q.B., 619.
(3) (1903) 1 K.B., 750 at p. 754. (4) (1907) 1 K.B., 769.
(5) (1908) A.C., 16 at p. 20.

WHITE, C.J., WALLIS AND SANKARAN-NAIR, JJ.

SHEIK MAHAMAD RAVUTHER v. THE BRITISH INDIA STEAM NAVIGATION CO., LTD.

Then follows a passage in the Lord Chancellor's judgment (at page 20) which has to be carefully considered with reference to the judgments of the Court of Appeal in the cases to which I have referred. The passage runs thus:—"I wish to say, with the utmost respect for the arguments of counsel, I cannot agree in what I think was the contention, that there is a canon of construction by which the rigour of interpretation in some commercial documents must be proportioned to the importance of the stipulation to be construed. I know of only one standard of construction, except where words have acquired a special conventional meaning, namely, what do the words mean on a fair reading, having regard to the whole document?" Now what the Lord Chancellor stated as the argument of counsel with which he could not agree was "the contention that there is a canon of construction by which the rigour of interpretation in some commercial documents must be proportioned to the importance of the stipulation to be construed." The principle which underlay Walton, J.'s judgment and which was accepted by the learned Lord Justices and by Gorell Barnes, J., was much more precise and specific than the contention of counsel before the House of Lords as described by the Lord Chancellor. The principle was that an exception in general words, not expressly relating to negligence even though the words are wide enough to include loss by the negligence or default of the carrier's servants, must be construed as limiting the liability of the carrier as assurer and not as relieving him from the duty of exercising reasonable skill and care, and that if the carrier wishes to exempt himself from liability for the negligence of his servants he must insert in his contract something equivalent to a negligence clause. I cannot help thinking that if the Lord Chancellor had intended to repudiate this principle of construction as applicable to documents when a carrier purports to relieve himself from liability for negligence, he would have done so in express terms. It is no doubt true that the bill of lading in the present case does not contain contradictory terms and, in a sense, it is not ambiguous, but the portion of the bill of lading which deals with the liability of the carrier at the particular stage of the adventure when the negligence occurred, is not express with reference to the question of negligence, and this being so I do not think the carrier is protected.

WHITE, C.J., WALLIS AND SANKARAN-NAIR, JJ.

SHEIK MAHAMAD RAVUTHER v. THE BRITISH INDIA STEAM NAVIGATION CO., LTD.

Having regard to the way in which the earlier authorities have been considered in the more recent cases, I do not propose to discuss the earlier cases which were cited in argument. I will merely say that as regards shipping contracts with the exception of *Taubman* v. *The Pacific Steam Navigation Company*(1), I know of no case in which the shipowner has been held to be protected from negligence unless the contract protected him from negligence in express terms. It seems doubtful whether this case should now be treated as a binding authority. Further, the contract there had reference to passenger's baggage, and it is not clear whether the shipowners were under any liability as common carriers with regard to this baggage.

As in my view of the law a shipowner is not exempted from liability for negligence unless the contract which exempts him is both clear and express, and as the contract in the present case, though it may perhaps be said to be clear is certainly not express, I am of opinion that the defendants are not protected by their bill of lading.

Two other questions remain for consideration. I can deal with them shortly. Mr. Sundara Ayyar contended that a contract which purported to relieve a shipowner from his liability as a carrier for negligence was contrary to public policy and should not be enforced. As pointed out by Walton, J., in *Price & Co.* v. *Union Lighterage Company*(2) the law of the United States of America forbids a carrier to exempt himself by contract from liability for negligence, whilst the law of England does not. I am of opinion that on a question of this character Courts in India ought to follow the law of England.

Mr. Sundara Ayyar raised the point that, as the learned Judges who heard this case on second appeal did not differ on the question of negligence, no appeal lay under article 15 of the Letters Patent with reference to this question. This point is covered by authority. In *Kunhunni* v. *Sri Vallabhan*(3), it was held by a Full Bench of this Court that the limited construction contended for by Mr. Sundara Ayyar should not be put on article 15 of the Letters Patent.

I am of opinion that this appeal should be allowed with costs throughout, and that if the parties cannot agree as to damages the

(1) (1872) 26 L.T., 704. (2) (1903) 1 K.B., 750.
(3) (1901) 11 M.L.J., 10 at p. 17.

case should go back to the Court of First Instance in order that damages may be assessed.

WALLIS, J.—In this case the learned Judges before whom the case came on second appeal differed on the question whether the defendants were liable under the terms of their bill of lading for loss or damage occasioned to the goods whilst in course of landing and delivery by reason of the negligence of their servants. In the result the decree of the lower Appellate Court was affirmed under section 575, Civil Procedure Code, and the plaintiff has now preferred this appeal under section 15 of the Letters Patent. The lower Appellate Court held that, under the bill of lading, the defendants were not liable for the negligence of their servants and also found as a fact that there had not been any negligence, but both the learned Judges before whom the case came on second appeal, though differing as to the liability of the defendants for negligence were of opinion that this finding must be set aside, and that the defendants were guilty of negligence. The question most argued before us was, whether the defendants were liable under their bill of lading for negligence in landing the cargo, but it was also contended by the appellant that even if the bill of lading on its true construction exempted the defendants from liability for the negligence of their servants, such an exemption was opposed to public policy and void under section 23 of the Indian Contract Act.

Further questions were raised as to whether in an appeal to this Court under section 15 of the Letters Patent it was open to either party to re-open any question on which the learned Judges had agreed, and, if so, whether in the present case the learned Judges were right in setting aside the finding of the lower Appellate Court that there had been no negligence.

As regards the third point I am of opinion that on an appeal from a judgment of the two Judges of this Court who have differed in opinion, the appeal is not confined to the point upon which the learned Judges differed, and that the whole case is open on the appeal. Clause 15 provides (1) that from the judgment of the single Judge of the High Court an appeal shall lie to the High Court, (2) that from judgments of two or more Judges of the High Court where they are equally divided and do not constitute a majority of the Court, an appeal shall also lie to the High Court, and (3) that appeals from other judgments of the High Court

shall lie to the Privy Council. There is nothing in the clause to suggest that appeals under (2) are more restricted than appeals under (1) and (3). Nor is there anything in the concluding portion of clause 36 which merely provides how a case is to be decided when the Judges before whom it is heard are equally divided in opinion, or in clause 39 which places certain restrictions on the right of appeal to the Privy Council provided for in the third part of clause 15. This is how, in my opinion, the case stands upon the language of the sections, and the same conclusion has been arrived at in the judgment of a Full Bench in *Kunhunni* v. *Sri Vallabhan*(1) by which we are bound.

As regards the second point I am of opinion that it is not open to us to hold that contracts exempting a carrier from liability for the negligence of his servants are void as opposed to public policy As pointed out by Walton, J., in *Price & Co.* v. *Union Lighterage Company*(2), "the law of England, unlike the law of the United States of America, does not forbid the carrier to exempt himself by contract from liability for the negligence of himself and his servants; but, if the carrier desires so to exempt himself, it requires that he shall do so in express, plain, and unambiguous terms." So far as the general question goes this is the law which has been received and applied by the Indian Courts, (*Jellicoe* v. *The British India Steam Navigation Co.*(3), and *Hajee Ismail Sait* v. *The Company of the Messageries Maritimes of France*(4)). Contracts have been made and business has been carried on for many years in India on this footing, and if the law is to be altered now it must be by the legislature.

The next point is, assuming the rule laid down by Walton, J., to be correctly stated—and several subsequent cases were cited in which it was approved—whether in the bill of lading the carriers have stipulated for exemption from liability in terms sufficiently express, plain and unambiguous to satisfy the artificial rule of construction enunciated by Walton, J.? After stating the effect of the earlier cases Walton, J., sums up by saying "It really comes to this, that if a carrier wishes to exempt himself from liability for the negligence of his servants he must insert in his contract, in one form or another, something equivalent to what is well known as a

(1) (1901) 11 M.L.J., 10 at p. 17.
(2) (1903) 1 K.B., 750.
(3) (1884) I.L.R., 10 Calc., 489.
(4) (1905) I.L.R., 28 Mad., 400.

negligence clause." In that case the only evidence of the terms of the contract was a statement at the head of the carriers' stationery that they would not be liable for any loss or damage which could be covered by insurance, and Walton, J., held that these general words would not exempt them from liability for their servants' negligence. In the present case the bill of lading expressly excepts "accidents, loss or damage from any act, neglect, or default whatsoever of the Pilot, Master or Mariners, or other servants of the Company," and, to borrow the language of Mr. Scrutton in article 91 of his book on 'Charter-parties and Bills of Lading,' exceptions such as this "unless otherwise clearly worded, limit the shipowner's liability during the whole time he is in possession of the goods as carrier, and therefore apply during the loading and discharging of the goods."

The respondents however rely on one of the conditions at the foot of the bill in which it is stipulated that the company is "to have the option of delivering the goods, into a receiving ship, or landing them at the risk and expense of the shipper or consignee, and is also to be at liberty until delivery to store them in receiving ship, godown or upon any wharf, the usual charges therefor being payable by the shipper or consignee," and that "in all cases and under all circumstances the liability of the Company shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee." The question is, do these general words impose upon the carriers a liability for the negligence of their servants from which they would have been exempted under the express terms of the bill but for these words? In my opinion, reading the exception with the condition, the clear intention of the parties was, by these words, to confer upon the carrier, as regards this particular stage of the adventure, a larger degree of exemption than he had stipulated for generally as regards the whole adventure in the exceptions. To read such general words of exemption as imposing upon shipowner as regards this stage a liability for negligence against which he has already stipulated generally is, in my opinion, not so much interpreting as altering the contract. The rule laid down in the judgment of Walton, J., is a rule of interpretation, and there was no difficulty in applying it in that case as the general words stood alone and there was no context to throw any light

on the intention of the parties. In *Steinman & Co.* v. *Angier Line*(1), one of the principal cases cited, Bowen, L.J., stated the rule to be that "words of general exemption from liability are only intended (unless the words are clear) to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants." In my opinion these general words if read with their context are clear. That this artificial rule of construction did not, in the opinion of Bowen, L.J., wholly supersede the general rules of construction which require the whole contract to be read together and effect given as far as possible to every stipulation, and general words to be construed in the light of their context, I think, may be gathered from the fact that he was at pains to point out that the exception of negligence in that case did not affect the construction of the general words under construction which dealt with theft, as that was a case of wilful default not covered by the exception of negligence. Similarly in *The Pearlmoor*(2), Sir Gorell Barnes, when applying the judgment of Walton, J., to the interpretation of the general words then in question, relied on the fact that in that particular bill of lading negligence was only excepted in certain specific cases and not generally, to show that general words not relating to any of those specific cases could not be read as exempting from liability for negligence. In *British India Steam Navigation Company* v. *Ratansi*(3), which came before Sir Charles Farran a bill of lading of the present defendants and very much in the present form contained an additional clause now omitted. "If stored in receiving ship, godown or upon any wharf, all risks of fire, dacoity, vermin *or otherwise* shall be with the merchant," and it may well have been held that these words relating to the stage when the shipowner is in possession as warehouse-keeper and enumerating the specific risks which the merchant was then to bear did not exempt the carrier from liability for negligence merely because the general words "or otherwise" were added to the specific risks which the merchant was to bear at this stage. That decision in my opinion comes within the rule now laid down by the House of Lords that an ambiguous document is no protection.

(1) (1891) 1 Q.B., 619. (2) (1904) P. 286.
(3) (1898) I.L.R., 22 Bom., 184.

On the whole I have come to the conclusion that in this bill of lading the carriers have sufficiently protected themselves from liability for the negligence of their servants during the discharge of the cargo. To hold that these general words of exemption have the effect of imposing upon the carrier a liability for negligence appears to me, with great respect, to be carrying this doctrine of artificial construction further than it has ever yet been carried, and further than it ought to be carried. I am confirmed in this view by the recent decision of the House of Lords in *Nelson Line (Liverpool), Limited* v. *James Nelson & Sons, Limited*(1), the report of which has reached India since this judgment was written. Their Lordships in that case consider the effect of a clause exempting the shipowner from any damage or detriment to the goods which could be covered by insurance, words in effect the same as those considered by Walton, J., in *Price & Co.* v. *Union Lighterage Company*(2), but not standing by themselves, as in that case, but occurring in a bill of lading in the midst of other complicated and not altogether consistent stipulations. In the Court of Appeal, the case was held to be governed by the rule laid down by Walton, J., in *Price & Co.* v. *Union Lighterage Company*(3). Lord Loreburn remarked that the words taken by themselves seemed to excuse the shipowner from any imaginable liability except such as could not by law be underwritten. But, his Lordship went on to observe these words must be considered along with the context, and considering them along with the other provisions he found it impossible to ascertain what was the intention of the parties, and then explicitly rested his decision on the ground that an ambiguous document is no protection His Lordship, however, went on to make certain other observations in the light of which Walton, J.'s decision, and those that have followed it, will have to be reconsidered. "I cannot agree in the contention that there is a canon of construction by which the rigour of interpretation in some commercial documents must be proportioned to the importance of the stipulation to be construed. I know of only one standard of construction, except where words have acquired a special conventional meaning, namely, what do the words mean on a fair reading, having regard to the whole

(1) (1908) A.C., 16 at p. 20. (2) (1908) 1 K.B., 750 at p. 754.
(3) (1904) 1 K.B., 412.

document?" Applying this standard to the present case I fail to see any element of doubt.

The remaining point is whether there are sufficient grounds to justify this Court on Second Appeal in setting aside the finding of the lower Appellate Court and giving judgment for the plaintiff. Now the suit is brought in respect of 246 bags of rice out of 4,000 bags belonging to the first plaintiff which were carried on board a steamer chartered by the defendants from Rangoon to Tuticorin. The plaintiff alleges, that they were not delivered, but were landed in hurry and confusion, and became damaged and unfit for consumption by exposure to heavy rain at Tuticorin without being covered, and that they were consequently destroyed by the local municipal authorities whilst in the custody of the defendants Nos. 2 to 4, the agents of the first defendant, the British India Company. Now the lower Appellate Court has found that the defendants were not guilty of negligence in allowing the bags to get wet, and secondly that the damage to the bags was not in fact caused by their getting wet but was due to the length of time they were left on the foreshore by the consignees or their agents. Either of these findings is sufficient to dispose of the plaintiff's suit, and I see no sufficient reason for differing from either of them. But before coming to them it is important to see on the facts found by the lower Appellate Court or admitted, what was the custom of the port as to the landing of grain cargo. As to the customary manner of landing grain cargo, when the landing is undertaken by the ship, it is found that the custom which was observed in this case was for the ship to put the bags into boats and to carry them from the steamer, which cannot get within some miles of the shore, to the jetty, and to discharge the bags unsorted on the jetty, and then to remove the bags from the jetty and to sort them according to marks, on the foreshore, when they are at the disposal of the consignee. Now this, in my opinion, has a very important bearing in the present case, as when the consignee's agents have had notice, and are on the spot, the ship's liability, even apart from the bill of lading must, in my opinion, absolutely cease when the bags are sorted and stocked and at the disposal of the consignee. Bevan on 'Negligence in Law' (second edition), volume II, page 1307, cites 3 Kent. Comm., 215. It is then open to the consignee to remove them or to leave them on the foreshore at his own risk and expense, either protected or unprotected for as long a period

as suits his convenience. What he chooses to do with them is no concern of the carrier, and he cannot be called on to protect them with tarpaulins until the consignee chooses to remove them. To put the matter in another way a shipowner or charterer cannot be bound to carry about tarpaulins for the protection of cargo after he has landed it and placed it at the disposal of the consignees, or to keep a stock of tarpaulins for this purpose ready at the various ports at which the ship calls. It was not seriously contended that there was any such liability. This being so, as 246 bags were admittedly placed at the disposal of the consignees on the foreshore and were not seized and destroyed by the Municipality until three or four days later, the plaintiff's claim, in my opinion, is not so much for non-delivery of the bags as for failure to deliver them in good order and condition and must be so dealt with.

If this be so, the only question is, was the loss of these 246 bags due to damage received owing to the defendants' negligence during the landing and before they were sorted and stocked and at the plaintiff's disposal on the foreshore? Now it is stated by the late Mr. Carver, section 461, that "the manner of discharging also is, in the absence of special terms, to be determined by reference to the regulations and practices of the port of discharge," and I do not see how a shipowner or charterer who takes power to land cargo at the port of discharge at the consignee's risk can well be expected to take any greater precautions for the safety of the cargo than are usual and customary at the port. What is usual and customary in such a case is a good index of what is reasonably necessary for safety. Here the lower Appellate Court has found that there was no custom at Tuticorin to protect grain during landing with tarpaulins during the rainy season, and under these circumstances I do not see how we can be justified in interfering with the finding that there was no want of reasonable care in failing to protect them.

I think further that the conclusion to be drawn from the lower Court's findings is that the lengthy exposure to which some of the bags were subjected during transit in this case was due to exceptional circumstances which the defendants could not reasonably be expected to have foreseen—responsibility for which lay not with the defendants but very largely with the second and third plaintiffs, the agents whom the first plaintiff employed to take delivery of his consignment. Of the whole cargo of over 38,000

bags, plaintiffs Nos. 2 and 3 together had to take delivery of 22,500 bags including the first plaintiff's 4,000, that is to say, considerably more than half. On Wednesday the 24th October, the day of the ship's arrival, they and the other consignees received a notice, exhibit I, from the Company's agents at the port requesting them to take delivery of the cargo day by day as landed, as the space for landing on the foreshore was very limited, and pointing out that cargo left on the beach would be at the consignee's entire risk and expense. A portion of the foreshore it appears was covered with Government salt for export, and so unavailable for the grain cargo. The necessity for prompt action on the part of the consignees was all the greater, as the monsoon or rainy season might be expected to set in any day. Notwithstanding, according to the figures in exhibit IV, which the lower Appellate Court has accepted, the second and third plaintiffs and other consignees did not remove a single bag on Wednesday or Thursday, and only removed between five and six thousand bags on Friday and Saturday, so that on Saturday night there were over seventeen thousand bags ready for removal on the foreshore and the congestion there was so great that the defendants were unable to go on removing bags from the pier and sorting them on the foreshore, and on Saturday night the whole pier was covered with unsorted bags which had been discharged in the ordinary course from the ship and could not be sorted for want of room on the foreshore. On Saturday night the monsoon burst, and such of the 17,000 bags on the foreshore and of the bags on the pier as were unprotected were exposed to the rain. On Sunday the ship suspended discharge at the request of the consignees, but the consignees removed 7,000 bags and 5,000 more were removed from the jetty. On the morning of Monday, the 29th, there were 14,000 ready on the foreshore and two of the pier jetties were still covered with bags. The bags left on the foreshore by the consignees were obviously exposed to greater risk of damage than those on the pier owing to the possible effects of heavy rain on the foreshore. According to exhibit IX, it was the bad smell coming from the bags actually lying in the mud on the foreshore that led to the intervention of the Municipality on Monday, October 29th, when the Sub-Collector was brought down and examined the bags on the foreshore and on the jetties, and gave the consignees three days to clear them all, which the consignees undertook to do.

Then as to the question whether the damage to these 246 bags was due to wetting received before they were sorted and stocked, as to which the finding is in defendants' favour, it is argued for the appellant that there is nothing to show when these particular bags got wet or how they were damaged, and that the onus is on the defendants. This being, as I have said, really in the nature of a claim for failure to deliver in good order and condition, and delivery in the sense of putting these bags at the consignee's disposal being admitted, I think if the consignees wished to make a claim against the defendants for a total loss owing to the wet condition of the bags when put at their disposal, it was for them to show the time when the bags were put at their disposal, and that the condition of the bags when put at their disposal was such as to justify them in refusing to take delivery, or in afterwards rejecting these bags. This onus they have failed to discharge.

But even putting the onus on the defendants, and assuming the case most favourable to the plaintiffs, viz., that these particular bags were exposed on the jetty from Saturday night, I still think there is evidence to support the finding that these bags were damaged not by the wetting but by exposure on the foreshore for which the consignees are alone responsible. The Sub-Collector's action certainly goes to show that the bags which had been exposed on the pier had not sustained any serious damage on Monday morning and would have been all right if the consignees had removed them within three days as they undertook to do. That they had ample opportunity of removing them even earlier is shown by the figures in exhibit IV, which the lower Appellate Court has accepted. On Monday the consignees removed no less than 12,000 bags, leaving a balance of only 2,700 out of the 14,000 awaiting removal on that morning. A further 3,000 had been removed from the jetties and sorted that day making 5,700 ready on Tuesday morning. If they had gone on at the same rate as on Monday, they could have removed on Tuesday not only this 5,700, but also the greater part of the 4,600 sorted that day. The last of the bags so left on the pier on Saturday night must have been sorted and ready for removal on Tuesday when the ship completed her discharge and left the port, as the pier would have been cleared in the ordinary course to make room for the landing of further bags. But for some reason on Tuesday the

consignees chose to remove 1,100 only leaving over 9,000 ready. The last 3,000 or so were sorted on Wednesday, October 31st, but the consignees only removed 3,000 on that day leaving 9,000, and of these they afterwards removed 8,000 leaving 1,098 (including the 246 which are the subject of this suit), which were seized by the Municipality on the 2nd or 3rd November. I am not called upon to suggest why the consignees were so slow in removing the bags after Monday, but I think the District Judge was justified in view of the above facts in finding that the damage to these bags was not due to the wetting but was due to the length of time they were left on the foreshore. If the first plaintiff's bags were left on the foreshore that was obviously due to the action of the two agents he employed to take delivery, the second and third plaintiffs, and the defendants cannot be held responsible. But as I have already said even assuming the damage was caused to these bags by the wetting they received before they were placed at the disposal of the consignees, still I think the District Judge was justified in finding that failure to have tarpaulins ready and to protect the bags with them did not in the circumstances amount to negligence. I am therefore of opinion that on the findings and admissions there is no ground for setting aside the findings in favour of the defendants, and I am, of course, even more strongly of opinion that there are no grounds to justify us on second appeal in arriving at fresh findings in favour of the plaintiffs.

I would therefore dismiss the appeal with costs, but the decree must be in accordance with the opinion of the majority of the Court.

SANKARAN-NAIR, J.—I agree with my Lord the Chief Justice in holding that the loss to the plaintiff was caused by the negligence of the defendants' servants. Of the 1,098 bags destroyed, 246 belonged to the plaintiffs, and there is no evidence to show that they were ever ready for delivery by being separated from the rest and, if they were, when.

The second question is whether the defendants are exempted from liability by the terms of the bill of lading. On this question also I concur in the judgment of my Lord the Chief Justice. Briefly my reason is this :—

Primâ facie the defendants are liable for the negligence of their servants. They have to make out their exemption from

liability, and that can only be made out, if at all, by showing that the plaintiffs agreed to discharge them from it. It is not enough to use words which were intended by them for that purpose or which would ordinarily be regarded as exempting them. The cargo owner knows that the law makes the company liable, and he must therefore be told in clear and plain language and in explicit terms that they do not hold themselves liable to him for their servants' negligence to make up his mind whether under such circumstances he would ship his cargo or not. It must not be left to inference. Unless his attention is drawn to it, he is not to be presumed to discharge the shipowner. In the case before us, the negligence clause in the body of the bill of lading does not operate after the goods leave the ship's tackle, and the clause or condition inserted later in the bill does not refer to negligence. On these findings the plaintiffs are entitled to a decree in their favour, and it is not necessary to decide the other question raised by Mr. Sundara Aiyar that a contract exempting the shipowner from the negligence of himself or his servants cannot be enforced in this country. Mr. Justice Subramania Aiyar has left the question open. Mr. Justice Miller was not prepared to dissent from the decisions in which similar stipulations were treated as legal. My learned colleagues however who have heard this appeal have expressed their opinion on this point. I proceed accordingly to consider the question. As to the authorities, the cargo owner was not represented in the case *Jellicoe* v. *The British India Steam Navigation Company*(1), and there is no doubt in my mind on reading the judgment of the Chief Justice in that case and in the case *Mothoora Kanto Shaw* v. *The India General Steam Navigation Company*(2) that he arrived at his conclusion with evident reluctance. Neither in *Hassanbhoy Visram* v. *The British India Steam Navigation Company, Limited*(3), nor in *Hajee Ismail Sait* v. *The Company of the Messageries Maritimes of France*(4), was the illegality of the stipulation raised or discussed. The question therefore is not concluded by authority.

The rule of law in England which may now be taken to be established by the decisions referred to by Mr. Napier, and on which he relies, is thus stated in Carver's 'Carriage by Sea,' section 101—

(1) (1884) I.L.R., 10 Calc., 489. (2) (1884) I.L.R., 10 Calc., 166.
(3) (1889) I.L.R., 13 Bom., 571. (4) (1905) I.L.R., 28 Mad., 400.

"Bills of lading now commonly relieve the shipowner from responsibility for negligence of the master or mariners in navigating the vessel. Often the exception extends to acts of stevedores, and other persons employed by the ship; and sometimes it goes still further, and covers all wrongful acts, and neglects, and errors in judgment, whether of the owners, or of those in their service, or for whose acts they would otherwise be liable. There is nothing in our law to prevent the parties from making such a contract. The legislature has not interfered with shipowners, as it has with railway companies, to prevent *their enforcing contracts* which may seem to the Courts not to be reasonable."

In Indian law there is, of course, nothing like an unenforceable contract as only an agreement enforceable by law is a contract. Assuming then that a shipowner can enter into an agreement with the cargo owner as stated above, can it be possibly contended that we are to enforce, in this country, the English law of contract even where it differs from the Indian law. The validity of the agreement must be determined by the Indian law, and the fact that the parties stipulate to be bound by the agreement is of no avail, except in certain cases. Thus if in making the contract there was no consent, *i.e.*, the shipowner and the other party "did not agree upon the same thing in the same sense," or if the agreement was brought about by fraud, undue influence, coercion, or misrepresentation, then, there is no valid agreement or contract which an Indian Court will enforce, even though the parties may state in clear, express and unequivocal terms, that each party shall in spite of any such invalidating element perform such contract. No words can take the case out of the operation of the rule of law or exempt the party from liability for damages.

Similarly, if the consideration or object of the agreement is opposed to public policy as declared by the Indian Legislature or the Indian Courts, no words in a contract will estop a party from pleading, or the Courts from deciding, that the contract cannot be enforced. It makes no difference, so far as I am aware, in India, that it was the agent who was guilty of the particular act which invalidates the contract.

Let us then test the validity of this exemption clause by the Indian Contract Act.

Section 148 of the Indian Contract Act as pointed out by the Judicial Committee in *The Irrawady Flotilla Company* v.

Bugwandas(1), undoubtedly includes bailment for carriage. This is also the view of the Calcutta High Court in *Mackillican* v. *The Compagnie Des Messageries Maritimes De France*(2), and of the Bombay High Court in *Kuverji Tulsidas* v. *The Great Indian Peninsula Railway Company*(3). A shipowner is a bailee within the terms of that section. Under section 151 of the Act, the defendants therefore are bound to take as much care of the goods as a man of ordinary prudence would under similar circumstances. It is only the incident of any contract not inconsistent with its provisions that remains unaffected by the Contract Act (see section 1 of the Contract Act). The incident of the contract before us that the bailee is exempt from taking the care required by section 151 appears to me to be clearly inconsistent with that section. Section 152 seems to make this clear. It declares that the bailee's liability is limited as declared by section 151, "in the absence of any special contract," or in other words he may by contract undertake a higher responsibility for instance that of an insurer. The Calcutta High Court and the Judicial Committee relied upon this section to hold that these provisions do not limit the liability imposed by the common law rule recognized in the Carriers Act, 1865, which was the only point decided in that case. The provision in section 152 that a bailee may undertake a higher responsibility, the absence of a similar provision that he may limit the liability imposed by section 151, and the fact that, in the chapter IX relating to Bailment, whenever a rule of law is intended to operate only in the absence of a contract to the contrary it is expressly so stated—(see sections 163, 165, 170, 171 and 174)—leave on doubt in my mind that a bailee's liability cannot be reduced by contract below the limit prescribed by section 151. In fact, throughout the Act, whenever the legislature intended that the provisions of the Act should be enforced only in the absence of a contract between the parties they have said so. (See sections 109, 113, 116, 121, 93, 94, 95, 202, 219, 221, 230, 241, 253, 256, 261, 265.) The obligation imposed by section 151 applies to bailees as well as to their servants in the discharge of their duty. The agent represents the bailee under the Act. The Contract Act thus sweeps away all the distinctions between the degrees of care required of the

(1) (1891) I.L.R., 18 Calc., 620 at p. 627. (2) (1881) I.L.R., 6 Calc., 227.
(3) (1879) I.L.R., 3 Bom., at p. 109.

bailees. In the English law the amount of care required seems to depend upon the benefit accruing to the bailee. Under the Contract Act the obligation arises from the simple fact of accepting delivery or receiving property for a certain purpose, and the care to be taken is the same in all cases. Thus, under section 71, a person undertakes the same responsibility as a bailee from the mere fact of taking goods belonging to another into his custody. The relations between parties may well be left to be regulated by contract when the degree of care required is dependent upon the benefit derived from the bailment, but when the same amount of care is required independent of any benefit to the bailee then it may well be that the legislature did not think it right to allow the bailee to reduce his liability.

Assuming then that the rule of English law that a common carrier can get rid of his liability by contract has been accepted in India, the contract itself must be obviously one which will be recognized in the Indian Courts, and, if I am right in the view above set forth, it necessarily follows that while a common carrier may exempt himself from the liability of an insurer by contract, he cannot exempt himself from the liability of an ordinary carrier imposed by section 151 of the Indian Contract Act.

Further, let us see whether there is any consideration for the exemption. The English common law is stated in these terms by Lord Blackburn :—"At the common law, a carrier who received goods as such was responsible for every injury occasioned to them by any means except the act of God or of the Queen's enemies. He was also bound to receive goods tendered to him for carriage, and was liable to an action if he refused to receive them without reasonable excuse and such an action might still be maintained."

For any agreement to relieve the common carrier from this responsibility under the common law for negligence, among other things there must be consideration. In this case what is the consideration? Not the undertaking to carry cargo. Because the defendants as common carriers are bound on payment of freight to receive and carry it to its destination. Is it then the special rate at which this cargo was to be conveyed? I agree that the reasonableness of the freight will depend upon various conditions such as weight, measurement or value. It is unreasonable to expect a shipowner to carry goods worth a few rupees and jewels possibly worth lakhs for the same remuneration; the

negligence of his servants in the one case may cause him only a trifling loss, while in the other case it might be his ruin. It is only right therefore that he should be entitled to demand higher rates for certain goods, subject to this condition that they must not be prohibitive rates intended to coerce the owner to accept any conditions the shipowner might think it fit to impose. In such cases the shipowner may tell the owner, we will undertake the risk only if you pay the higher rate. Otherwise we undertake no risk. Similarly according to some English cases if the shipowner is willing to carry cargo for below what would be a reasonable remuneration for carrying it at his risk on condition that he is to have no liability at all and the owner agrees to the reduced rates discharging him from the common law liability there may be an agreement with a good consideration. (See *Peek* v. *North Staffordshire Railway Company*(1).) I doubt, for the reasons already pointed out, whether this is permissible under the Indian Contract Act. But, in any event, it is for the shipowner to offer the alternative rates for the owner to make his election. It cannot be said in this case then that the plaintiffs elected to pay a lower rate on condition that the defendants are not to be liable for their servants' negligence.

The other conditions in the bill of lading also require notice. There is a clause that packages of more than a certain weight are only carried at advanced rates of freight and by special agreement. There is another clause which requires that for gold, precious stones, etc., over the value of Rs. 500, a special shipping order or advice note must be granted after a declaration of their value. This appears reasonable. But I can see no consideration for a stipulation that the company will not be responsible for negligence even after receiving the higher freight for the greater care required on account of the nature of the goods. The agreement therefore so far as this stipulation is concerned is without consideration.

I have assumed throughout that it is open to the shipowner, a common carrier, to enter into a contract of exemption from liability, if such contract is for consideration and is not opposed to the Indian Law of Bailment. I now proceed to consider the other question whether the common law liability of a common carrier may be limited by contract in India.

(1) 10 H.L.C., 473.

In deciding whether the English law to this extent has been followed in India, it is necessary to bear in mind that it makes no difference whether the exception relates to the negligence of the master or his servants; that the stipulation may be admittedly unreasonable; and that the liability of a shipowner in cases similar to the one before us is the same as that of an inland common carrier.

Whenever I refer to negligence, I mean negligence in not taking reasonable care or the care required by section 151 of the Indian Contract Act.

How far this common law liability could be modified by contract between the parties was stated by Mr. Story in his book on Bailments, section 549, published in 1832. "It was," he says, "formerly a question of much doubt, how far common carriers on land could by contract limit their responsibility, upon the ground, that exercising a public employment, they are bound to carry for a reasonable compensation, and have no right to change their common law rights and duties, and it was said, that, like innkeepers they are bound to receive and accommodate all persons, so far as they may, and cannot insist upon special and qualified terms. The right, however, of making such qualified acceptances by common carriers seems to have been asserted in early times. Lord Coke declared it in a note to Southcote's case(1); and it was admitted in *Morse* v. *Slue*(2). It is now settled and recognised beyond all reasonable doubt. Still, however, it is to be understood, that common carriers cannot, by any special agreement, exempt themselves from all responsibility, so as to evade altogether the salutary policy of the common law. They cannot, therefore, by a special notice, exempt themselves from all responsibility in cases of gross negligence, or fraud; or, by demanding an exorbitant price, compel the owner of the goods to yield to unjust and oppressive limitations of his rights. The carrier will also be equally as liable in case of the fraud or misconduct of his servants, as he will be in case of his own fraud or misconduct."

In the opinion of Lord Blackburn "the weight of authority was in 1832 in favour of this view of the law."

Story defines "gross negligence" to be the want of such care as a prudent man would take of his own property (section 11).

(1) 4 Co. Rep., 84.

(2) 1 Vent. R., 238.

Best, J., in *Batson* v. *Donovan*(1), and Dallas, C.J., in *Duff* v. *Budd*(2) give a similar definition, or, in other words, the degree of care is similar to, if not the same as, that required to be taken by a bailee by section 151 of the Indian Contract Act.

The Carriers Act of 1830 enabled the inland common carriers to exempt themselves from liability by special agreement and as there was no reason to treat carriers by sea differently from the carriers by land, the Judges held that they came within the reason of the statute and were therefore similarly entitled to enter into contracts of non-liability. Let us see how these questions have in the meantime been dealt with in India.

The corresponding Indian Act is the Common Carriers Act of 1865, based mainly on the English Act of 1830. Before 1865, there was Act 18 of 1854 relating to Railway Companies, and, it may be noticed that, the right of limiting their liability by private contract even when such contract was reasonable was not given to them as in the case of English Railway Companies by the corresponding English statute passed about the same time, and the companies were expressly made answerable for the gross negligence or misconduct of their servants. The earlier sections of Act III of 1865 extend to India the principles embodied in the English statute of 1830 relating to carriers. Section 6 of the Act, like section 6 of the Statute, declares that common carriers may limit their liability by contract with the important limitation that in the case of an agent of the owner of the goods he must be duly authorised in that behalf. This deviation from the English law was made to prevent common carriers from securing the signature of the cooly to what may afterwards be pleaded as a contract against the owner. Then we have the two important sections which I place below side by side for contract and comparison.

Sec. 8 (*Cap.* 68) *of XI Geo. IV & I Will IV.*	*Sec.* 8 *of Act III of* 1865.
Provided also, and be it further enacted, that nothing in this Act shall be deemed to protect any Mail contractor, Stage Coach Proprietor, or other common Carrier for Hire from Liability to answer for Loss or Injury to any goods or Articles whatsoever arising from the felonious Acts of any Coachman, Guard, Book-keeper, Porter, or other Servant in his or their Employ, nor to protect any such Coachman, Guard, Book-keeper, or other Servant from Liability for any Loss or Injury occasioned by his or their own personal Neglect or Misconduct.	Notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried, where such loss or damage shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants.

(1) 4 B. & A., 30.

(2) 3 B. & D., 182.

It is difficult for any one to read these two sections without coming to the conclusion that it is an emphatic repudiation by the legislature of the doctrine of English law that a common carrier may exempt himself from liability for the negligence of his agents or servants. If we follow the process of reasoning adopted by the English Judges and apply to the steamship companies the rules of law declared applicable to inland common carriers, there is no reason why this principle embodied in Act III of 1865, section 8, should not be applied to them as a rule of justice and equity. It is impossible to hold that the law of common carriers *in this respect* is the same in India as in England. When the Madras Government suggested that the railway companies in India might be allowed the same liberty as in England to enter into reasonable contracts, it was the opinion of Story quoted above and the American law that was expressly relied upon by Sir Henry Maine for not following the English law. The rule of English common law adopted in India before 1865 was, as stated by the *Chief Justice* and *Mitter, J.*, *Mothoora Kanto Shaw* v. *The India General Steam Navigation Company*(1), the rule which imposes upon the common carrier the liability of an insurer. There is nothing to show that the right of exemption by contract was ever recognised. It was the attempt of the common carriers to do so that led to this legislation. Is there any reason why in the absence of any legislation a different rule should be applied to carriers by sea in deviation of the course followed by the English Judges. If we adopt the conclusion of

(1) (1884) I.L.R., 10 Calc., 166.

Brett, J.—*Liver Alkali Company* v. *Johnson*(1) and *Nugent* v. *Smith*(2) that the law relating to the shipowners who carry goods for hire whether by inland navigation or abroad is based upon a custom, which he traces to Roman law, by which no insurer's liability attached to carriers by land, then we may possibly be justified in treating such carriers on a different footing. But this view has been strongly dissented from by Cockburn, C.J., in the Court of Appeal in *Nugent* v. *Smith*(2) and is not now accepted. On the other hand it is now settled beyond doubt that the liability of a shipowner is the same as that of a common carrier.

I am therefore of opinion that the English common law that has been accepted in India is the law as declared by Story and Lord Blackburn which is based on grounds of public policy applicable alike to England and India; that its further development as to exemption by contract due to the Carriers Act of 1830 for loss due to negligence has not been accepted in India, but, on the other hand, has been declared inapplicable by Act III of 1865 to the cases falling within that Act, and following the reasoning of the Privy Council, that, though an Act may be inapplicable, it ought to be followed as a rule of justice, equity and good conscience, in cases similar to those dealt with by the legislature in the absence of any circumstances to the contrary, the principles embodied in Act III of 1865 ought to be followed. I am further of opinion that a rule of English common law ought not to be followed when it is opposed to the principles followed and acted upon by the Indian legislature.

The next question is whether the contract exempting a shipowner from the consequences of the negligence of himself or his servants in not taking reasonable care or the care referred to in section 151 of the Indian Contract Act is opposed to public policy and is therefore void. See section 23, Indian Contract Act.

I have already pointed out that I can see no consideration for this stipulation. It has been held to be unreasonable in the case of railway companies (*Peek* v. *North Staffordshire Railway Company*(3)) and in Carver's book it is admitted that the contract need not be reasonable. If the obligation is imposed upon a common carrier for the benefit of the public, he cannot claim exemption

(1) L.R., 9 Ex., 338. (2) 1 C.P.D., 19 and 423.
(3) 10 H.L.C., 473.

by virtue of an unreasonable stipulation. The reason why a common carrier is bound to receive goods tendered and the great responsibility of an insurer is imposed upon him is that necessity compels the owners of goods to trust him. This liability is imposed upon him in the words of Lord Mansfield "to prevent litigation, collusion and the necessity of going into circumstances impossible to be unravelled." As Best, C.J., puts it in *Riley* v. *Horne*(1) "When goods are delivered to a carrier, they are usually no longer under the eye of the owner . . . . If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves." For the above reasons it is essential that common carriers must in India also be subject to the English common liability, and the Privy Council have now placed the matter beyond dispute. Where the obligation is imposed upon the common carrier for the benefit of the public he cannot get rid of that obligation by agreement, if it is not reasonable. The Act III of 1865 has declared that the common carriers governed by that Act should not be allowed to claim exemption for negligence by contract and so far as they are concerned any such provision would be illegal. If the English law applies a shipowner may get the signature of a cooly who brings the goods, to any document which will be treated as binding on the cargo-owner, and this, in express terms, is prohibited by Act III of 1865.

The reasons given above by Lord Holt, Lord Mansfield and Abbot, C.J., are, it appears to me, conclusive to show that it is against public policy to allow a claim for exemption as the one now put forward. There is practically no freedom of choice, and persons when entrusting shipowners with their property are obliged to accept any condition that may be imposed upon them by the steamship companies. The cargo-owners have no control over the servants, and it is only right that the master and not the cargo-owner should suffer for the misuse of his powers by the servant as he has armed him with those powers. The law which requires care and diligence on the part of a carrier will, otherwise, be

(1) 5 Bing. Rep., 217 at p. 220.

illusory in the case of steamship companies as everything is left to the servants. There will be a tendency to lax supervision over the servants, and to make their selection dependant more upon cheapness than on efficiency. I fully agree with the learned Chief Justice of Calcutta, that if the defendants are right the law renders it practically impossible in the great majority of cases to fix the carriers with any responsibility. Nothing is more easy than for the carriers to call their servants as witnesses and to prove *primâ facie* that the goods were protected in the usual way. It would then be impossible for the plaintiff to bring negligence or criminality home to the carriers although the goods may not be forthcoming and no explanation given how the loss occurred.

I am quite alive to the fact that, if possible, we ought to follow the English law in this respect.

There are only two reasons given by Phillimore, J., in *The Duero*(1) for deciding in favour of the legality of the contract. The first is that a lower freight might have been paid on account of this exemption. I have already discussed that question and, as a matter of fact, it does not appear to be so in this case. The second reason is that the cargo-owner might have got his goods insured. This reason is not applicable where there is no general system of insurance. Further, that an insurer may exempt himself from liability as the cargo-owner could insure elsewhere appears to me with all respect to the learned Judge not a satisfactory reason.

It has also to be remembered that the English law attaches an importance to freedom of contract which is not recognised in India where people are accustomed to have their relations regulated not by contract, but by law to a greater extent than in England. Holding the view that such an agreement is unreasonable the English Judges construe the terms of every agreement very strictly against the shipowner. The rule has not been accepted in America. The Indian law on bailment is not the same as English law on a material and relevant point. The Common Carriers Statute of 1830 is different in this respect from the Common Carriers Act of 1865. In the Liverpool Bill of Lading of 1882, the Hamburg Bill of Lading of 1885, and London Conference Rules of Affreightment, 1893, exemption

(1) L.R., 2-A. & E., 393.

from loss arising from negligence in the cases referred to therein were allowed, but not in a case like the one before us. So too in the forms adopted in the Mediterranean, Black Sea and Baltic trades and in the New York trade respectively in 1885, in each case after long negotiations in which both merchants and shipowners are alleged to have taken part.

Such an exemption clause is therefore clearly against the interests of the mercantile community and not necessary in the interests of shipowners.

I am of opinion, therefore, that it is against public policy to enforce this stipulation, and that it must be left to the legislature, if necessary, to introduce a rule of law, held unreasonable in England and utterly unsuited to the conditions of this country.

I would therefore allow the appeal with costs throughout and that if the parties cannot agree as to damages the case should go back to the Court of First Instance in order that damages may be assessed.

The judgments of the Chief Justice and Sankaran-Nair, J., prevail.

This Letters Patent Appeal having been again posted '*To be spoken to*' before the Chief Justice and Sankaran-Nair J., with reference to the question of damages, the Court delivered the following

JUDGMENT.—As the parties are unable to agree as to damages the case must go back to the Lower Appellate Court for a finding as to damages, the Lower Appellate Court to be at liberty, if it thinks fit, to remit the case to the Court of First Instance for the purpose of assessing the damages.

Fresh evidence may be taken. The finding should be submitted within three months from this date and seven days will be allowed for filing objections.

In compliance with the above order, the Subordinate Judge at Tinnevelly submitted the following

FINDING.—The High Court sent down the following issue for a finding thereon to the District Court which has remitted it to this Court for assessing the damages :—"What amount are the plaintiffs entitled to recover on account of damages."

After the remand, the fourth defendant is reported to have been dead, but the plaintiff did not want to bring in the legal representative of the deceased defendant as party, but stated that he

WHITE, C.J., WALLIS AND SANKARAN-NAIR, JJ.

SHEIK MAHAMAD RAVUTHER v. THE BRITISH INDIA STEAM NAVIGATION CO., LTD.

would take a decree against the remaining defendants only. On the issue being then taken up for trial, plaintiff and defendants Nos. 2 and 3 agreed that the damages might be estimated at a uniform rate of Rs. 10 per bag and interest thereon allowed at 6 per cent. per annum. First defendant did not appear at the trial, but the claim against him is proved by the testimony of a witness examined on plaintiff's behalf. The witness is employed in a firm at Tuticorin from before October—November 1900 and in his deposition he swears that Rangoon rice was selling at not less than Rs. 10 a bag in that month. He also referred to an account book which he held in his hand and which according to him was kept and maintained in the ordinary course of business, and swore that according to the entries in it, the market rate of Rangoon rice was more than Rs. 10 per bag in the month aforesaid. I shall accept this evidence as correct and find the damages to amount to Rs. 2,460 being the value of 246 bags of rice undelivered. Interest will be allowed on this amount at 6 per cent. per annum from date of cause of action up to suit and it comes to Rs. 46-3-3. My finding on the issue remitted is that the amount to which plaintiffs are entitled to recover as damages is Rs. 2,506-3-3.

This Letters Patent Appeal coming on for hearing after the return of the said finding the Court delivered the following

JUDGMENT.—On the findings which we accept there will be a decree for the plaintiff for the amount of damages found with interest at 6 per cent. on the principal amount from the date of plaint.

Messrs. *David & Brightwell*, *Moresby*, attorneys for respondents.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

D'CRUZ AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

D'SILVA AND OTHERS (DEFENDANTS), RESPONDENTS.*

1908. September 23. October 16.

Right of suit—Civil Procedure Code, ss. 30, 539—*Suit by subscribers of society maintainability of.*

Some of the subscribers to a society brought a suit on behalf of themselves and other persons interested against the office bearers and members of the society, for the removal of the office bearers and for an account of the affairs of the society. No sanction of the Advocate-General under section 539 of the Code of Civil Procedure or permission of Court under section 30 of the Code for bringing the suit was obtained by the plaintiffs. Under the rules of the society, the subscribers as such, had no control over the officers of the society or the conduct of the society's affairs and they were not beneficiaries having any claim on the funds of the society:

Held, that they had no right to maintain the suit.

Per Sir ARNOLD WHITE, C.J.—Even if it is assumed that the suit was maintainable without the sanction of the Advocate-General under section 539 of the Code of Civil Procedure, the plaintiffs cannot maintain the suit as they were not members of the society and their rights were in no way analogous to the rights of worshippers in a Hindu temple, who could maintain a suit in their own right.

Per ABDUL RAHIM, J.—Assuming that the defendants are in the position of trustees of the society, liable to be sued for misconduct by persons interested, the plaintiffs cannot maintain a representative suit without sanction or leave obtained under section 539 or 30 of the Code of Civil Procedure.

Section 539 is enabling as regards the general public interested, in the sense that two persons may sue now *where it would have been necessary before that all should sue*, or that some should obtain leave to sue on behalf of the rest.

Thackersey Dewraj v. *Hurbhum Nursey*, [(1884) I.L.R., 8 Bom., 432], distinguished.

Budree Dass Mukim v. *Ghooni Lal Johurry*, [(1906) I.L.R., 33 Calc., 789], referred to.

Subbayya v. *Krishna*, [(1891) I.L.R., 14 Mad., 186], referred to.

SECOND APPEAL against the decree of J. H. Munro, District Judge of South Malabar, in Appeal Suit No. 40 of 1905, presented against the decree of C. Hanumantha Rao, Subordinate Judge of Cochin, in Original Suit No. 31 of 1904.

The facts necessary for the report are set out in the judgments.

The Subordinate Judge, in whose Court the suit was instituted,

* Second Appeal No. 1281 of 1905.

framed a preliminary issue whether the plaintiffs as subscribers had a right to bring the suit and he decided that they had not.

His decision was confirmed on appeal. The judgment on appeal was as follows :—

"The plaintiffs, on the ground that they are subscribers to an association known as the St. Vincent de'Paul Conference of Cochin, sue to remove the defendants who are the office bearers of the association for an account of the funds and other reliefs. The lower Court raised the preliminary issue whether the plaintiffs as subscribers have a right to maintain a suit of this nature. The issue having been found in the negative, the plaintiffs appeal.

The appellants' vakil practically contended himself with asserting in so many words that subscribers as such have a right to bring a suit like the present. For his sole authority he relied upon I.L.R., 8 Bom., 432. That case does not help us, for apart from being subscribers the plaintiffs in that case had the right to sue by reason of being devotees of the idol. The plaintiffs do not sue as beneficiaries under the trust. The beneficiaries are admittedly the poor of Cochin. There seems to be no authority for the position that a person not a beneficiary under a trust can bring an action like the present against the trustee. Suits under section 539, Code of Civil Procedure, are suits by beneficiaries against trustees (I.L.R., 15 Mad., 241 at p. 246). The interest entitling a person to sue under Act XX of 1863 is the interest of a person deriving benefit from the religious institution by having the right of attendance or of partaking in the distribution of alms. Under the Trust's Act it is the beneficiary who is given the right to proceed against the trustee. I find no reference in that Act to a suit by persons in the position of the plaintiffs, nor does there seem to be any such reference in Lewin on 'Trusts.' I am of opinion therefore that the lower Court's finding on the preliminary issue is correct. This appeal therefore fails and is dismissed with costs."

The plaintiffs appealed to the High Court.

P. R. Sundra Ayyar for appellants.

J. C. Adam for first, second and fourth to seventh respondents.

JUDGMENT (Sir ARNOLD WHITE, C.J.).—In this case the plaintiffs sue as subscribers to a society known as the Society of St. Vincent de'Paul St. Francis Conference, on behalf of themselves and all other persons interested in the subject-matter of the suit.

They ask in their plaint (1) that the defendants may be removed from their respective offices in the St. Vincent de'Paul St. Francis Conference at Cochin, and (2) that they may be ordered to render an account of the affairs of the society for the time during which they were in office.

In their written statement the defendants allege that the society is a voluntary society whose primary object is the spiritual wellbeing of its members, and that only, secondarily, it has a charitable object, as ministering to such spiritual welfare; that the society is governed by a written constitution and by the directions issued by the general council in Paris; that the first plaintiff has been a subscriber of the sum of two annas monthly from 1893 till December 1902, since when he has subscribed four annas per mensem; and that the second plaintiff has been a subscriber of two annas per month till December 1903, and in January 1904 increased the subscription to four annas.

The suit was decided on a preliminary issue whether the subscribers to the society have, as such, any right to bring a suit of this kind. The Courts below have held they have no such right. The organisation of the society and the objects for which it was intended are explained in the judgment of the Subordinate Judge.

I express no opinion whether this suit is maintainable without the consent of the Advocate-General having been obtained under section 539 of the Code of Civil Procedure. For the purposes of my judgment I assume that the suit can be brought without the consent of the Advocate-General.

It has not been suggested that under the rules of the society, subscribers, as such, have any control over the officers of the society or the conduct of the society's affairs. The officers of the society are appointed under the rules of the society, and not by the subscribers. It is clear that subscribers are not entitled as of right to make any claims upon the funds of the society. They are not the beneficiaries of the trust.

I do not think the decision of Scott, J., in *Thackersey Dewraj* v. *Hurbhum Nursey*(1) applies to the present case. In that case, in dealing with the question whether the plaintiffs could maintain the suit in their own right and in their own names

(1) (1884) I.L.R., 8 Bom., 432.

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without the permission of the Court or notice to other parties interested under section 30, the learned Judge observed that the plaintiffs sued not as members of the caste but as subscribers to the temple funds and devotees of the idol, and, as such, each had a right to complain of mal-administration.

In the present case it does not appear that the plaintiffs are even members of the society, and their ecclesiastical rights, if any, in connection with the society, are, in my opinion, in no way analogous to the rights of the worshippers in a Hindu temple.

I think the Courts below were right and I would dismiss the appeal with costs.

ABDUR RAHIM, J.—The plaint in the suit states in its first paragraph that the plaintiffs who are the subscribers to the society of St. Vincent de'Paul St. Francis Conference, British Cochin, sue on behalf of themselves and all other persons interested in the subject-matter of the suit, and, in its second paragraph, describes the seven defendants respectively as the President, the Secretary, the Treasurer and the active members of that society. The reliefs specifically asked for are the removal of the defendants from their respective offices, for accounts and for payment into Court of the money which may be found due from them to the society. Assuming that the defendants are in the position of trustees of the society, or of the Cochin Conference, and thus liable to be sued for misconduct or neglect of their duties, by persons interested in the administration of the trust which is one partly for religious and partly for charitable purposes, the plaintiffs clearly cannot maintain a representative suit like this without the sanction or leave obtained either under section 539 or section 30 of the Civil Procedure Code. But it is contended by the learned vakil for the appellants that the decisions reported in *Budree Dass Mukim* v. *Chooni Lal Johurry*(1) and *Subbayya* v. *Krishna*(2) have laid down the law differently. All that these two cases lay down is that section 539 of the Civil Procedure Code is permissive, and not mandatory, so that suits which were maintainable before its enactment without special leave are not affected by its provisions. But in *Subbayya* v. *Krishna*(2) the general rule is stated to be that, all persons interested in a suit should join in

(1) (1906) I.L.R., 33 Calc., 789 at p. 804.
(2) (1891) I.L.R., 14 Mad., 186 at p. 209.

WHITE, C.J., AND ABDUR RAHIM, J.

D'CRUZ v. D'SILVA.

bringing it, and Woodroffe, J., in *Budree Dass Mukim* v. *Chooni Lal Johurry*(1) says with reference to section 539, "As regards the general public interested, it is enabling, in this sense that two persons may sue now *where it would have been necessary before that all should sue*" (the italics are mine), "or that some should obtain leave to sue on behalf of the rest. To this special privilege it annexes a condition to prevent wasteful suits in that it requires that sanction should be obtained." I adopt this proposition as correctly stating the law, and hence the present suit having been brought without the sanction of the Court or the consent of the Advocate-General has been rightly held to fail.

If the defendants be treated as servants of the council appointing them, and not trustees the suit might be open to a further objection that they are liable to be sued only by their employers. I am inclined to think however that they occupy the position of trustees.

In the view I have expressed it is not necessary that I should deal with the argument of the learned counsel for the respondents that the suit is not maintainable because the plaintiffs are subscribers paying only a small monthly subscription, and not beneficiaries who alone, according to him, can institute such an action as this. Nor do I feel myself called upon to consider his other argument, that, as the prominent object of the society is the advancement of the spiritual benefit of the members and charity is but its subsidiary object, the Civil Courts have no jurisdiction to entertain a suit relating to its management. But I must say that I should have felt considerable hesitation in accepting either of these two contentions. However that may be, for the reasons I have mentioned I agree that the appeal must be dismissed with costs.

(1) (1906) I.L.R., 33 Calc., 789 at p. 804.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sankaran-Nair.

1908. September 28.

SULTAN SAHIB MARAKAYAR AND OTHERS (DEFENDANTS NOS. 3, 5 TO 9), RESPONDENTS—APPELLANTS,

v.

CHIDAMBARAM CHETTIAR AND ANOTHER (PLAINTIFFS NOS. 2 AND 3), PETITIONERS—RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, s. 318—Limitation Act, Act XV of 1877, sched. II, arts. 178, 179—Application under s. 318 of the Code of Civil Procedure not an application for execution and falls within art. 178, sched. II of the Limitation Act.

An application by a decree-holder, under section 318 of the Code of Civil Procedure, to be put in possession of property purchased, by him at sale in execution is not an application for execution of the decree and, for purposes of limitation, falls within article 178 and not within article 179 of schedule II of the Limitation Act. Such application is barred when presented more than three years after the grant of a certificate of sale.

Muttia v. *Appasami*, [(1890) I.L.R., 13 Mad., 504], considered.

APPEAL against order of H. Moberly, District Judge of South Arcot, in interlocutory application No. 134 of 1907.

In execution of a razinamma decree passed on the 26th February 1895, immoveable property was brought to sale and purchased by the plaintiffs, to whom a sale certificate was granted on the 3rd August 1900. The second and third plaintiffs made an application for delivery of possession under section 318 of the Code of Civil Procedure in 1907.

The other facts necessary for the report appear in the judgment.

The District Judge held that article 179, schedule II of the Limitation Act, applied to the case and that the application, though brought more than three years after the grant of the certificate, was not barred, as it should be considered to be an application for execution and was made within three years of the preceding application for execution. He accordingly directed delivery of possession.

The defendants appealed.

T. R. Venkatarama Sastri for appellants.

* Civil Miscellaneous Appeal No. 262 of 1907.

MILLER AND SANKARAN-NAIR, JJ.

SULTAN SAHIB MARAKAYAR v. CHIDAMBARAM CHETTIAR.

K. Srinivasa Ayyangar for respondents.

JUDGMENT.—The decree-holder purchased in an execution sale in 1899 certain property of the judgment-debtor and in 1900 obtained a sale certificate. The decree was not completely satisfied by the sale, and further proceedings were taken to which it is not necessary to refer, otherwise than to say that, they may be taken to have arisen out of applications for execution or to take steps in aid of execution. Then, in 1907 the decree-holder for the first time applied for delivery of possession of the property to which he became entitled by virtue of his sale certificate of 1900.

The question is, whether his application is within time? and the case has been argued on the footing that the answer must be in the affirmative if article 179 of schedule II of the Limitation Act is applicable to the case, and, in the negative, if it is not applicable, article 178 being in that event the appropriate article.

We are of opinion that article 178 is the article applicable, and that the application for delivery of possession is not one for the execution of a decree. In *Muttia* v. *Appasami*(1) it is true one of the learned Judges expressed an opinion that article 179 would decide whether an application under section 318 of the Civil Procedure Code is or is not within time, and the other learned Judge also expressed an opinion that an application under section 318 of the Civil Procedure Code is substantially an application for execution. But the question which they had to decide was between a period of thirty days' limitation and a period of three years. Their decision on the question of limitation would have been the same had they applied article 178 and not article 179 of schedule II of the Limitation Act. We cannot therefore take this case as a decision on the point before us.

There is no case to which we have been referred which actually decides this question on a consideration of the difference between the two articles, but the Bombay High Court has held more than once that article 178 ought to be applied, (*Basapa* v. *Marya*(2). *Hanmantrao Pandurang Joglekar* v. *Subaji Girmaji*(3), and *Kashinath Trimbak Joshi* v. *Duming Zuran*(4)) in the case of an application under section 318 of the Civil Procedure Code, and we think these decisions are right.

(1) (1890) I.L.R., 13 Mad., 504.
(2) (1879) I.L.R., 3 Bom., 433.
(3) (1884) I.L.R., 8 Bom., 257.
(4) (1893) I.L.R., 17 Bom., 228.

MILLER AND SANKARAN NAIR, JJ.

SULTAN SAHIB MARAKAYAR v. CHIDAMBARAM CHETTIAR.

It is clear that an application by a decree-holder for delivery of possession of property purchased in execution is not in strictness an application for execution of the decree, a direction for delivery of possession being no part of the decree, and though we may be bound by a number of decisions to hold that such an application raises a question relating to the execution of the decree, it does not follow, and we do not think, that it is an application for execution. To hold that it is an application for execution might involve injustice. In a case, for instance, like that decided in *Basapa* v. *Marya*(1) an application, though made within three years of the sale certificate, would, if article 179 is applicable, have to be held barred by limitation under that article, if not made within three years of the next preceding application to take a step in aid of execution: and so it might happen that in a case where, in execution, a sale is held say eleven years after the date of the decree, an application for possession made within three years of the sale certificate would, with reference to section 230 of the Civil Procedure Code, have to be rejected as barred by limitation if it is to be treated as an application for the execution of the decree. These consequences of applying article 179 to an application under section 318 cannot have been intended and can be avoided by applying article 178. It was contended that, in the case last suggested, the application for possession would be treated as an application in a pending execution proceeding but that is clearly not a sound contention. Apart from section 318, Civil Procedure Code, which requires an application by the purchaser, an application for execution by way of an auction sale could not contemplate delivery of possession to the applicant as a consequence of the sale.

For these reasons we reverse the order of the lower Court and dismiss the application with costs throughout.

(1) (1879) I.L.R., 3 Bom., 433.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Pinhey.

KAJIKAR LAKSHMI (FIRST RESPONDENT), APPELLANT,

v.

MARU DEVI AND OTHERS (NOS. 1 TO 4 PETITIONERS AND SECOND RESPONDENT), RESPONDENTS.*

1908. October 29.

Guardian and Wards Act VIII of 1890, *ss.* 10, 11—*No guardian of property to be appointed in the case of a minor member of an undivided family governed by Aliyasanthanam Law.*

The only right of a minor member of an undivided family governed by Aliyasanthanam Law is a right to be maintained in the family house; and, where there are adult members of such family, no guardian of property of such minor can be appointed by the Court under the Guardian and Wards Act.

No such appointment can be made, even with the assent of the adult members, as the minor has no property in respect of which a guardian can be appointed.

APPEAL against the order of H. O. D. Harding, District Judge of South Canara, in Original Petition No. 87 of 1907. Petitioners Nos. 1 and 2 and petitioners Nos. 3 and 4 (minors) were members of an undivided family of Jains governed by the Aliyasanthanam Law. The second petitioner was the son and petitioners Nos. 3 and 4 minor daughters of the first petitioner.

The petitioners applied under sections 10 and 11 of the Guardian and Wards Act for the appointment of a guardian of the properties of the minor Nos. 3 and 4 petitioners.

The petition was opposed by the grandmother of petitioners Nos. 2—4 on the ground that no guardian could be appointed as the family was an undivided family governed by the Aliyasanthanam Law. The District Judge appointed a guardian.

The grandmother (first respondent in the lower Court) appealed.

K. Ramanath Shenai and *K. P. Madhava Rao* for appellant.

The Hon. The Advocate-General for respondents.

JUDGMENT.—There is ample authority that a guardian of the property of an infant cannot properly be appointed in respect of the infant's interest in the property of an undivided Mitakshara

* Civil Miscellaneous Appeal No. 295 of 1907.

MUNRO AND PINHEY, JJ.

KAJIKAR LAKSHMI v. MARU DEVI.

family, the reason being that the infant's interest is not individual property—*vide Gharibullah* v. *Khalak Singh*(1), *Harihar Pershad Singh* v. *Mathura Lal*(2) and *Sham Kuar* v. *Mohanunda Sahoy*(3).

The same principle would apply *a fortiori* in the case of an Aliyasunthanum family like the present, where the only right of the infant is a right to be maintained in the family house. It is argued that there is no objection to the appointment of a guardian in the present case because the mother and adult brother of the minors are willing that a guardian of the minor's property should be appointed. This however cannot affect the question; seeing that the minors have no property in respect of which a guardian can properly be appointed. This appeal is therefore allowed and the order of the District Judge set aside with costs in both Courts.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Sankaran-Nair.

1908. November 20. December 3.

SUBBARAYA MUDALIAR AND OTHERS, PLAINTIFFS,

v.

RAKKI, DEFENDANT.*

Estates Land Act (Madras) I of 1908, s. 189—Civil Courts have jurisdiction to hear and determine suits instituted before Act came into force.

Section 189 of the Madras Estates Land Act does not take away from Civil Courts the jurisdiction to hear and determine suits which were taken cognizance of by them before the Act came into operation. The section merely bars cognizance of suits and says nothing of pending suits.

Sadasiva Pillai v. *Kalappa Mudaliar*, [(1901), I.L.R., 24 Mad., 39], referred to.

Vedavalli Narasiah v. *Mangamma*, [(1904), I.L.R., 27 Mad., 538], referred to.

CASE stated under section 617 of Act XIV of 1882 by S. Rangadha Mudaliar, District Munsif of Tiruvalur, in Small Cause Suit No. 130 of 1908.

The facts of the case are sufficiently stated in the judgment.

T. Rangaramanujacharlar for appellant.

C. Aiyasami Sastri for respondent.

(1) (1903) I.L.R., 25 All., 407. (2) (1908) I.L.R., 35 Calc., 561.
(3) (1892) I.L.R., 19 Calc., 301. * Referred Case No. 13 of 1908.

MUNRO AND SANKARAN-NAIR, JJ.

SUBBARAYA MUDALIAR v. RAKKI.

JUDGMENT.—The question referred to us is whether suits for the recovery of rent, which, under the provisions of the Madras Estates Land Act I of 1908, are exclusively cognizable by the Revenue Court, are triable by the Civil Courts after that Act came into force if they were filed before the date when the Act came into force. We have no hesitation in answering the question in the affirmative. There is nothing in section 189 of the Madras Estates Land Act which takes away from the Civil Courts the jurisdiction to hear and determine suits which were taken cognizance of by them before the Act came into operation. Section 189 merely says that Civil Courts shall not take cognizance. It says nothing about pending suits. We are fortified in our opinion by the decision in *Sadasiva Pillai* v. *Kalappa Mudaliar*(1), *Vedavalli Narasiah* v. *Mangamma*(2) and *Nana bin Aba* v. *Sheku bin Andu*(3).

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Pinhey.

1908. July 20 to 24, 27 to 31. August 3 to 6. November 23.

ROBERT FISCHER AND OTHERS (PLAINTIFFS NOS. 1 TO 4), APPELLANTS,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, THROUGH THE COLLECTOR OF MADURA (DEFENDANT), RESPONDENT.*

Water, right of Government to divert and distribute by irrigation works—No action against Government without proof of damage—Paramount right of Government higher than that of riparian owners—Easement Act, s. 7 (2) (a) and s. 7, ill. (h)—Right of diversion for riparian and non-riparian purposes—Right of riparian owner to take out water put in by himself.

The Government has power, by the customary law in India, to regulate in the public interests, in connection with the collection, retention and distribution of waters of rivers and streams flowing in natural channels, and of waters introduced into such rivers by means of works constructed at the public expense, and in the public interests, for purposes of irrigation, provided they do not thereby inflict sensible injury on other riparian owners and diminish the supply they have hitherto utilised.

(1) (1901) I.L.R., 24 Mad., 39. (2) (1904) I.L.R., 27 Mad., 538.
(3) (1908) I.L.R., 32 Bom., 337. * Appeal No. 60 of 1904.

In regard to works of irrigation constructed by Government in connection with a natural stream, a riparian owner has no higher right than that of not being damaged by any diminution in the supply of water he has been accustomed to receive. The *onus* of proving damage lies on the riparian owner.

The maintenance of irrigation works is a duty cast upon Government and the rights and liabilities of Government in connection with irrigation works are not commensurate with those of private riparian proprietors. They are analogous to those of persons and corporations on whom statutory powers have been conferred and statutory duties imposed.

Ponnusawmi Tevar v. *Collector of Madura*, ([1869-70], 5 M.H.C.R., 6), referred to.

Kristna Ayyan v. *Venkatachella Mudali*, ([1871-74], 7 M.H.C R., 60), referred to.

Madras Railway Company v. *Zemindar of Carvatenagarum*, ([1873-4], 1 I.A., 364), referred to.

Sankaravadivelu Pillai v. *Secretary of State for India in Council*, ([1905], I.L.R., 28 Mad., 72), referred to.

First Assistant Collector of Nasik v. *Shamji Dasrath Patil*, ([1883], I.L.R., 7 Bom., 209), referred to.

This paramount right of Government is recognised by the Legislature in section 7 (2) (*a*) of the Easement Act. It is independent of the ownership of the bed of the stream and exists alike whether the interest affected is that of ryotwary tenants or of the holders of proprietary estates.

The right of riparian owners, recognised by section 7, ill. (*h*) of the Easement Act, to the flow of water without interruption, is only a right to enjoy without *such interruption as will cause material damage*. As between riparian owners the law established in England is that diversion of water for riparian purposes is not actionable without proof of injury, but diversion for non-riparian purposes is actionable without proof of such injury.

Kensit v. *Great Eastern Railway Company*, ([1883], 23 Ch.D., 566), referred to.

Bailey & Co. v. *Clark, Son & Morland*, ([1902], 1 Ch., 649), referred to.

Debi Pershad Singh v. *Joynath Singh*, ([1897], I.L.R., 24 Calc., 865), referred to.

Swindon Water-works Company v. *Wilts and Berks Canal Navigation Company*, (L.R., 7 H.L. [E. & I.], 697), referred to.

McCartney v. *Londonderry and Lough Swilly Railway*, (1904, A.C., 301 at p. 313), referred to.

In India, however, the Government by virtue of the paramount power vested in it as aforesaid will not be liable, in either case, without proof of damage:

Quære.—Whether the American law of "appropriation," by which the upper riparian owner may divert water for non-riparian tenements provided the quantity so taken does not inflict perceptible injury on the lower riparian proprietor cannot, having regard to the climate and other circumstances in India, be applied to this country.

Belbhadur Pershad Singh v. *Sheikh Barkat Ali*, ([1906-7] 11 C.W.N., 85), referred to.

An upper riparian proprietor is entitled to divert water, provided the amount diverted does not exceed the amount which he has himself, by artificial means, put into the stream.

APPEAL against the decree of T. M. Rungacharriar, Subordinate Judge of Madura (West), in Original Suit No. 22 of 1901.

[The facts for the purpose of this report are sufficiently stated in the judgment.]

T. Rangachariar, *S. Venkatachariar*, *V. N. Kuppu Rao* and *K. Parthasarathy Ayyangar* for appellants.

The Hon. The Advocate-General and *T. Subrahmania Ayyar* for respondent.

JUDGMENT.—This is an appeal from a decree of the Subordinate Judge, Madura (West), dismissing the plaintiff's suit. The first plaintiff is a landowner of Madura who owns, among other villages, the inam village of Ananjiyur and the 4 villages, Kondagai, Thoothai, Pappangulam and Karisalkulam, formerly attached to the Sivaganga Zamindari. Of Kondagai, the principal village, he is the Sub-Division Zamindar. Thoothai and Pappangulam are riparian villages. Karisalkulam, Ananjiyur and Kondagai are non-riparian, but are directly or indirectly watered by small channels from the Vaigai. All the five villages are situated below Madura. On behalf of himself and other riparian proprietors, the first plaintiff filed this suit early in 1901 together with a petition under section 30, Civil Procedure Code (Act XIV of 1882), alleging the following causes of action:—

(i) That the defendant had illegally and wrongfully constructed in June 1900 a work of a permanent and substantial character over the crest of the Peranai dam to the length of 929½ feet thus raising the height of the dam by 1 foot 9 inches in parts and 2 feet 3 inches in other parts and causing an obstruction to the natural flow of the water and materially diminishing the supply to the lower riparian owners.

(ii) That the defendant had about June 1896 illegally and wrongfully opened a new channel 100 feet wide in place of the old Vadagarai channel which was only 20 feet wide and thereby caused a larger volume of water to be diverted than he was customarily entitled to and thus also diminished the flow of water to the lower riparian proprietors.

He prayed for a declaration that the defendant had no right to increase the height of the dam or the width of the old channel, for an order for the removal of the obstruction on the dam, for the closing of the new channel and for a permanent injunction.

The defence was shortly as follows :—

(i) That the defendant as owner of the bed of the Vaigai and the water flowing therein has by the customary law of India full power to regulate in the public interest the distribution of the water of a natural stream and consequently that even as riparian proprietors, the plaintiffs are not entitled to the undiminished flow but merely to the amount sufficient for their customary needs.

(ii) That as a fact the defendant had not diminished but increased the usual flow.

(iii) That, as the first plaintiff knew, the two works complained of had been executed by the defendant in order to utilise the large increased supply of water let into the stream by the defendant at a point 86 miles above the dam from what was known as the new Periyar reservoir, constructed by the defendant in the Travancore Hills after years of labour and at a cost of over a crore of rupees for the benefit of the district which was frequently affected by famine.

The Subordinate Judge who tried the suit framed 14 issues which will be found in paragraph 4 of his judgment. He gave a definite finding however only on the ninth issue which runs as follows :—

"Have the opening of the new channel and the construction of the new works at the Peranai injuriously affected or are they likely injuriously to affect the flow of water enjoyed by the plaintiffs before the introduction of the Periyar water into the river?".

On this issue he found against the plaintiffs (on whom he casts the burden of proof) and dismissed the suit.

For the purpose of this decision, the Subordinate Judge found (though this issue was not specifically raised on the pleadings) that the defendant was a riparian proprietor at the north end of the Peranai dam. He held that there must be a permanent injury and not a prospective one or the suit was premature, that the defendant was entitled to take out the water that he put in 86 miles higher up the stream and lastly that no substantial injury had been proved.

It will be convenient to describe briefly the nature of the Vaigai river and the character of the irrigation works carried out by Government. The Vaigai is the chief river in the Madura district and drains the major portion of it. From its mouth,

near Ramnad, to the source of its chief tributary, the Suruliyar (called the Vyravanar in its upper reaches), its length is about 200 miles. Nearly midway and on its south bank, lies the town of Madura. Some 20 miles above Madura and 40 miles below the junction of the Vaigai and the Suruliyar was an ancient "*anicut*" called the "*Peranai*" or the great dam. It crossed the river obliquely from south to north and was 1,319 feet in length. It conducted the water of the river without a head sluice down an old channel on the north bank called "*Vadagarai*" which irrigated some 4,200 acres of Government land. The dam and channel were maintained by Government. Some 2½ miles below the "*Peranai*" was another dam called "*Chittanai*," or the small dam. This is also an ancient work maintained by Government which, by means of a similar channel called the "*Thengarai*," irrigates a large acreage on the south bank of the Vaigai.

The Vaigai is not a perennial stream throughout its course. At ordinary seasons the bed of the river contains a thin and shallow stream as far as the *Chittanai* dam. Below that point the river opens out into a wide bed of deep sand by which even moderate floods are absorbed before reaching Madura. For another 40 miles or so a subterranean flow can be detected, but at about the point where the river enters the Ramnad Zamindari, even this is lost. Below the *Chittanai* the dams cease as the perennial surface flow has ceased but the flood waters are still abstracted by means of numerous channels having temporary dams run out in a slanting direction to midstream. The water thus captured is stored in tanks or reservoirs and the supply is supplemented where possible in the dry season by water drawn off from the underground flow. This underground flow is secured by digging channels in the sandy bed of the river (often for a considerable distance) in the hot weather and leading the water to the mouth of the channel it is intended to supply. It may be observed that as all the channels both above and below the *Chittanai* are *primarily* intended to intercept as much flood water as possible to store the reservoirs they are made much larger than would be the case if merely intended to convey the small normal supply. It must also be noted that the water is never utilised at the point of capture as it has to be conducted a considerable distance before it reaches land at a level capable of being irrigated by direct flow.

It is to be observed that it was no part of the original Periyar Project that the Peranai dam should be raised. After three years' experience with the Periyar water however it was found that the head of the new channel and the bed of the river above the old dam had silted up to such an extent that the bed of the stream was nearly level with the top of the dam. In India all the dams and channel heads in sandy river beds are liable to silt up in this way, though usually it is a result that it takes several years to produce. The obvious remedies are two. Either the silt must be removed or the dam has to be raised. There are however limits to the application of the latter remedy. If the banks of the river are low, as in this case, a few feet added to the height of the dam would result in the river carving out for itself another channel. On the other hand, the removal of silt is no simple or easy matter. When a river has silted up so that its bed is level with the top of a six feet dam, it means that not merely the portion immediately in front of the dam has become silted up but that the whole length of the river through which a six feet fall has occurred has also been silted up, and this may necessitate the removal of silt for a mile or more of the river bed before the original position of affairs can be restored. The usual practice therefore is, when the deposit of silt is not rapid, to apply both remedies at one and the same time to some extent. In the case of ordinary dams, this silting up being a very gradual process, it usually suffices at first to place turf along the top of the dam. A later stage is reached when this remedy no longer suffices and a permanent increase to the height of the dam has to be resorted to. There is evidence in this suit of the custom of turfing dams in general and this dam in particular, and it is shown that when the *Chittanai* dam was extensively repaired for the last time it was permanently increased in height. One fact must not be lost sight of, viz., that both these river dams, as originally constructed, were able to, and usually did, cut off the entire supply of water in the river except in times of flood. The only passage for water to pass below the dam at ordinary seasons was the sand sluice which will be referred to later. The mere raising of such a dam therefore does not in any way affect the customary flow of water in the river. When the river is in flood, the raising of the dam also makes no difference unless the dam be raised to a greater height than is necessitated by the rise in the bed level of the river for when the same depth of water in the river is reached that enabled it to overflow the original dam it overflows the raised dam with equal facility.

So far we have merely dealt with the methods employed in restoring the '*status quo*' in the case when a dam has been silted up. A contrivance is also employed for preventing such silting up of the dam. All these river dams are supplied with what are called sand sluices. These are passages for water provided in the dam generally close to the mouth of the channel taking off from it, and capable of being closed at will. The sill level of such a sluice usually indicates the level of the bed of the off-take channel. In times of flood such sluices are opened with the result that the silt that would otherwise accumulate in front of the dam and the channel head is carried down the stream below the dam. The sluice can of course be utilised at other times also if the supply of water is in excess of the needs of the irrigation channel that the dam is intended to supply.

So far as the Peranai dam is concerned the conditions were as follows:—The old dam was 1,319 feet in length and consisted of two portions with crests of different height and a sand sluice in between. The floor of the sand sluice was 619·19 feet above the mean sea level and the sluice had only three vents 3½ feet square. The portion of the dam south of the sand sluice was 915 feet in length with an average height at the crest of 623·88 or 4·69 feet above the floor of the sand sluice. The portion of the dam north of the sand sluice was 375 feet in length with a height of 624·88 or 5·69 feet above the floor of the sand sluice. The upper portion of the old Vadagarai channel has ceased to exist and its width is disputed. The first plaintiff avers that it was only 20 feet wide. The real width however must have been about 40 feet. We may neglect the oral evidence as vague and discrepant. The fact is put beyond reasonable doubt by the following evidence. In 1882 when the Periyar Project was being investigated a plan was prepared. It is exhibit XIX and is drawn to scale. It shows the head of the old channel and the head sluice then proposed but not the one actually constructed. This plan shows that the head of the channel as it then existed was 40 feet wide and at the first bend it was about 70 feet wide. This evidence is corroborated by measurements taken after the

commencement of the suit of the width of the channel at a point lower down its course where the "*Chakkarai Anicut*," a masonry work, still exists. [See the evidence of the defendant's eighth witness and exhibits LXXI and LXXII.] As already stated the old channel had no head sluice. As it was the object of the Periyar Project to divert the Periyar river into the Vaigai and withdraw the water so diverted at the Peranai dam a wider channel was required to carry the increased supply of water. To prevent an excessive supply of water being taken down the wider channel in time of flood (when the Periyar tunnel is of course kept closed to prevent waste) the new channel was provided with a head sluice. As the increased supply of water would naturally bring down more silt the sand sluice had to be enlarged. The old sand sluice was accordingly blocked up and a new sluice opened beyond the northern portion of the dam having 5 vents instead of 3 and with each vent 5½ ft. × 6 ft. instead of 3 × 3½. The sill level of the sand sluice was also lowered it being placed at 616·12 or more than 8 feet lower than the old sluice. As the sill level of the head sluice of the new channel was 617·12 feet the sand sluice was actually 1 foot lower than the bed of the channel at its head.

The circumstances in which the suit came to be instituted were these. The Periyar water was first utilised for the cultivation season commencing with July 1896. By the middle of 1899 it was found that the dam and channel head had rapidly silted up in spite of the special arrangements made to prevent such an occurrence. It was then that the defendant raised the crest of the 915 feet portion of the dam, first by putting up a turf bund on it three or four feet high and in 1900 when this was found ineffective in consequence of the turf bund being frequently washed away by floods, by erecting a more permanent structure in the shape of falling shutters with pillars in between for their support. The falling shutters were 2 feet 3 inches high and were intended to fall flat in times of flood. The supporting pillars were 1 foot 9 inches. The northern portion of the dam was not raised. Now 1899 happened to be an unusually bad season and the first plaintiff who had not complained during the three preceding years, hearing of the turf bund on the dam, visited the spot in November of that year and made his first representation to the Collector—*vide* exhibit C, dated 22nd November 1899.

A perusal of that document shows that at that date his only objection was to the raising of the height of the dam. He complained of the turf bund erected on the southern portion and also alleged that the northern portion had been raised 1 foot by masonry. This latter complaint was apparently an erroneous surmise on his part as it was afterwards given up. He had not seen the dam before and was therefore not aware that that portion of the dam had always been 1 foot higher than the southern portion. He made no complaint of the width of the new channel. Exhibit E, dated the 16th February 1900, his first notice of suit under section 424, Civil Procedure Code, shows that at that date also the first plaintiff had discovered no other cause of complaint than the raising of the dam. It was not till August 1900 when exhibit F the second notice of suit was sent that the width of the new channel was also objected to. It may here be mentioned that at the present date the condition of affairs has entirely changed. The entire dam has now been removed and been replaced by a shorter structure with sluices throughout its length going across the river at right angles and carrying a road bridge. A temporary injunction to restrain the defendant from carrying out his new work *pendente lite* was refused.

From the foregoing statement it will be observed (1) that the mere raising of the dam could not affect the customary flow of water down the stream provided the dam was not raised to a greater extent than that justified by the deposit of silt (the plaintiffs did not allege that this had been done); (2) that the increased width of the channel did not diminish the flow of water down the stream at ordinary seasons, for even in the pre-Periyar days the only water that flowed down the stream at such seasons was that which the defendant chose to allow to flow down through the small sand sluice and even this was intercepted by his own *Chittanai* dam 2½ miles below; and (3) that in consequence of the regulator and head sluice constructed at the head of the new channel, the defendant had provided against the contingency of taking an excessive supply down the new channel in times of flood.

The first question we propose to consider is whether the defendant is a riparian owner at the site of the Peranai dam. The Subordinate Judge has considered the question at some length in paragraphs 15 and 15A and we agree with his decision that the defendant is a riparian proprietor at the north end of the dam.

The Government village of Pillayarnattam has a river frontage from a few hundred feet above the dam on the north bank to a point some 6 furlongs below it and the plaintiffs' case, with reference to this question, is based on the fact that at the time of the Survey of the Taluk boundary the whole width of the river was shown as outside the village. The Superintendent of the Revenue Survey explained the circumstance when in the witness box. Even if the entire river had been held by the Revenue Survey to belong to the opposite zamin village as alleged, and there is no ground for the supposition as there is no record of right as required by the Revenue Survey rules, it would still be no justification for the assertion that Pillayarnattam was not a riparian village. The plaintiffs' assertion is based on the fact that the survey stones which demarcate the Pillayarnattam boundary leave a narrow strip of land a few feet wide between the village and the river. As pointed out by the Superintendent of Survey this is no indication that this strip belongs to the village on the opposite bank. The stones are so placed under the survey rules, which direct that in demarcating rivers, the stones shall be placed on the bank above the reach of floods.

The next question we propose to consider—and this, as it seems to us, is the crucial question in the case—is, was the Subordinate Judge right in holding that the burden was on the plaintiffs to prove damage or sensible injury and that they failed to do so. We will deal with the question of the burden of proof when we come to discuss the law. As regards the question of damage, we agree with the Subordinate Judge's finding of fact that the plaintiffs have not sustained damage or sensible injury by reason of the works which have been carried out by the defendant. It is not necessary to discuss the voluminous evidence at any great length as we have no doubt that the Subordinate Judge has correctly appreciated it. On the plaintiffs' side there is nothing that in our opinion can be regarded as trustworthy evidence. They did not claim damages and they omitted to produce any village accounts. The latter omission is not satisfactorily explained. They appear to rely chiefly on the argument that their rights must necessarily have been injured by the defendant's acts and seek to support their arguments by inferences drawn from the defendant's own registers and statistics. On the other hand, the defendant in our opinion has proved that the plaintiffs cannot have been injured in

any way. It is proved, and Mr. Fischer himself could not deny the fact, that whereas in the pre-Periyar days the Vaigai river was dry for ten months in the year opposite the town of Madura (where the Kondagai channel takes its rise) it now has a flowing stream for all but three or four months. The defendant has produced the accounts of numerous villages depending on the channel below the *Chittanai* as well as the Thengarai channel itself and these accounts show that in fact the villages below the Chittanai, and therefore outside the scope of the Periyar Project, have benefited considerably though of course not to the same extent as those that the project was designed to benefit. Amongst the accounts produced are those of two villages actually dependent on the same channel as Kondagai itself as well as those of other villages dependent on channels adjacent thereto. An examination of the account shows that the effect of the Periyar Project has been to largely increase double crop cultivation and to render the lands practically safe from *savi* (withering of crop for want of water) unless the season is exceptionally bad as was the case in 1899. Even the figures for 1899–1900 however show that the villages suffered less in that year than they did in the equally bad season of 1892–1893. There is also evidence to show that lands in these villages certainly have not fallen in value. The evidence in fact would seem to indicate a considerable rise in value of land. But the evidence is not so clear as it might have been on this point. It is probable that, now that the Periyar water has been utilised for a dozen years, evidence on the question would give more definite results. The largely increased flow of water opposite Madura is accounted for in two ways. The Public Works Department registers maintained at the *Peranai* dam when reduced to the same formula as was employed *formerly* at the *Chittanai* dam show that there is an increase of about 47 *per cent.* in the quantity of water now passing down towards Madura. To this must be added the drainage from the large area now cultivated on the north bank under the new Periyar channel. Four out of the six drainage channels from this area discharge into the Vaigai at or above the Madura bridge. In reply to these facts the plaintiffs aver that though the total supply in the river may have been increased, it does not come at the same season as heretofore and that the small hot weather freshes have been cut off and cultivation retarded. It seems to us the contrary is proved.

The Periyar tunnel is closed for 2 or 3 months each year and when it is closed the channel is usually also closed for removing silt and other repairs. At other seasons the bed of the river being left wet by the Periyar water the freshes that come down no longer waste their substance in filling the sandy bed and therefore water goes further than it formerly did. It was admitted by Mr. Fischer (first witness for the plaintiffs) and also by his expert witness Mr. O'Shaughnessy that heavy freshes were not appreciably affected by the new channel. In view of the fact that there are some 60 channels drawing off water between the *Chittanai* dam and the first plaintiff's Karisalkulam channel it is doubtful if the early freshes which were generally slight ever reached the first plaintiff's lands. The dam registers and exhibits LXVIII, CXVII, CXVIII and CXIX show that the early freshes have been more frequent since the Periyar tunnel was opened.

There is no evidence to justify the assertion that the defendant has ever drawn off through the new channel more water than he was entitled to take from the normal river supply. When the river is in flood the Periyar tunnel is left closed. The new channel irrigates over 11,000 acres of land that was formerly dependent on river channels. Of these about 4,200 acres were dependent on the old Vadagarai channel and 7,500 acres on 10 smaller channels that existed between the *Chittanai* dam and the Madura bridge on the north bank. By two independent methods of calculation it can be shown that the various channels supplying these 11,000 acres used to draw from the river at every fresh about 1,750 cubic feet per second (called cusecs) of water. It was shown that the 10 smaller channels had an aggregate drawing capacity of about 1,000 cusecs and the old Vadagarai channel one of about 750 cusecs assuming it to be 40 feet wide and capable of carrying water to a depth of 4·9 inches. Another calculation shows that 1,800 cusecs would be the quantity of water required to cultivate the area given if the water was taken only when freshes occurred, say, for 52 days in the year.

Now the evidence of the eighth witness for the defendant shows that the head sluice of the Periyar channel will not pass more than about 3,000 cusecs and that the new channel will not carry more than 1,839 cusecs because within a mile of its head the channel is supplied with an inlet which returns to the river through an undertunnel the surplus water if the water is more

than 6 feet in depth. The Peranai dam registers show that as a fact the actual supply passed down the new channel has never approached even this limit.

It was urged that the defendant is not entitled to take at the Peranai dam and through the new channel, water that was formerly taken below the *Chittanai*, *i.e.*, the water for the 7,500 acres mentioned above.

The lands of the contesting plaintiffs are below the points at which the 10 channels formerly took off and it cannot possibly affect them whether the water is now drawn off at the same points as before or at a single point still higher up. It was also urged on behalf of the plaintiffs that the defendant's own registers showed that the water supplied from the Periyar tunnel was much less than was anticipated while the area brought under cultivation under the main channel was larger than expected and therefore on his own calculation it must necessarily follow that more water was being appropriated from the natural supply of the river than formerly. The Subordinate Judge has discussed the question at length and the evidence was carefully gone into in this Court. We consider it would be a waste of time to discuss speculations of this character in face of the fact that, explain it how one may, the river at Madura is now far better supplied than in the pre-Periyar days. It will suffice to say that the evidence proves in our opinion that Mr. Pears' measuring of the weir below the tunnel was an unsuccessful experiment and that the discharge of the tunnel was much under-estimated until Mr. Chatterton made his more accurate experiments. Mr. Chatterton showed that the channel discharge over drop No. 1 was over-estimated for reasons he explained. So long as no one outside the department had any interest to question the statistics of the department these errors were of no great consequence and were not detected, as the methods formerly applied though inaccurate gave a sufficient approximation for the purposes of the department. By adopting Mr. Chatterton's figures, by substituting the results of practical experience for the estimates regarding evaporation and absorption, by making due allowance for the fact that a very large percentage of the land now classed under the Periyar Project was formerly irrigated land with a local supply of its own, which has not been cut off, and by adopting a reasonable figure for the duty of water (the text-books show how enormously the duty of water

varies under different conditions) it is not difficult to show that the existing condition of affairs can be explained without assuming that the defendant has made an unfair demand on the natural supply of the Vaigai to the prejudice of those having rights to water lower down the river. Lastly the assertion that the cultivation season has been set back in the lower reaches of the Vaigai to the prejudice of the lands there situate has not been proved. Again in the absence of any account on the plaintiffs' side we have to rely on those furnished by Government. As the Subordinate Judge points out the accounts do not support the averment. What does appear from the accounts is that in certain villages the cultivation season has changed but with advantage to the cultivators. In the pre-Periyar days there was usually one certain crop (the *Kalam* crop) and this was sown in September and reaped in January. If the season was good and the supply of water sufficient a second or *Kodai* crop was raised at considerable risk on some lands from February to May. Now, in consequence of the perennial flow in the river from May or June to the following February or March, the *Kodai* crop is sown not after the *Kalam* but before. The *Kalam* crop consequently cannot be sown till a little later than formerly as it has to wait for the *Kodai* crop to be harvested. The result in practice is that two good crops are now obtained in place of one good one and one uncertain one. The appellants' pleader said : " We sometimes suffer for want of water even now, but the lands under the Periyar Project never do." He overlooked the fact that the plaintiffs' lands suffered even more in the past than they do now.

We are of opinion that the plaintiffs have failed to show that they have sustained injury. On the contrary it seems to us that the defendant has proved that what he has done has benefited the plaintiffs.

This case has raised the broad question—and it is a question of first importance—as to whether Government have power by the customary law of India to regulate, in the public interests, in connection with the collection, retention and distribution of waters of rivers and streams flowing in natural channels and of waters introduced into such rivers by means of works constructed at the public expense and in the public interests for purposes of irrigation, provided that they do not thereby inflict sensible injury on other riparian owners and diminish the supply they have hitherto

utilised. The question was formulated as stated above by the Advocate-General in the Court below. (See the judgment of the Subordinate Judge on page 1273 of the printed pleadings.) Our finding of fact upon the evidence is that it has not been established that sensible injury has been inflicted on the plaintiffs, and that the supply of water which they formerly utilised has been diminished by the works which have been carried out by Government.

The plaintiffs sue as lower riparian proprietors and on behalf of other lower riparian proprietors alleged to have the same interest as the plaintiffs. Although some of the plaintiffs are the owners of lands which abut upon the right bank of the river, it would seem that the water which they or some of them use for irrigation purposes is outside the area of their riparian tenements since the channels by which the water is diverted to some of the lands are of considerable length. It is a question whether in a case of this sort the plaintiffs can sue in a representative capacity, since the cause of action of each plaintiff is distinct, and, if proof of damage is necessary, it was necessary for each party, who alleges damage, to prove it. In this connection it may be observed that the lessees of the Sivaganga Zamindari who came in as plaintiffs in the suit are not parties to this appeal. We assume, however, for the purposes of this judgment that the water has been used by the plaintiffs, or some of them, for the purpose of their riparian tenements and that the order which was made under section 30 of the Civil Procedure Code, was rightly made. It was contended on behalf of the defendant that Government have a paramount or sovereign right to regulate the distribution of water for purposes of irrigation subject to the limitation mentioned, namely, that they should not injure riparian owners or diminish the supply which they have been accustomed to utilize. It cannot, at this time of day, be contended that it is not one of the duties of Government to maintain and carry out works of irrigation. Sir Subramania Iyer, J., in his judgment in *Sankaravadivelu Pillai* v. *Secretary of State for India in Council*(1) on page 78, observes that " it is among the most important functions of the Government of this country to construct new works of irrigation and to maintain old ones according

(1) (1905) I.L.R., 28 Mad., 73.

to means and circumstances." Irrigation works on an extensive scale were carried out by the ancient rulers of India. This historical fact, however, affords us small assitance in dealing with the question of law raised in this case. The question we have to consider is the rights of the parties under the law as it stands to-day. There is, one fact, however, which is material and which is beyond the range of controversy, and that is, that the Peranai anicut in the Vaigai river was originally constructed by former rulers for the purpose of diverting the water of the natural stream into the Vadagarai channel. There is also another fact beyond the range of controversy and that is, that Government in discharging the duty which rests upon them in connection with works of irrigation have exercised the right of diverting the waters of natural streams. And in this Presidency, at any rate, we think, we are right in saying, it has never been held that in so doing they had violated the rights of private owners of land, unless the party who alleged himself to be aggrieved was able to prove that the amount of water which he had been accustomed to utilise had been diminished. To go no further afield than the Vaigai river itself, a report made by the District Engineer of Madura to the Collector in January 1859, exhibit Y, shows that the Engineer being of opinion that water was wanted on the south bank instead of being wasted on the north bank took steps to remedy this state of things by having vents of the sluices of the Peranai dam kept open for three days in each week. A further exercise of this right of control is shown by the report of the Engineer to the Collector in October 1861, exhibit Z, and an order of the Collector to the Tahsildar in the same month. It is scarcely necessary to point out that, in exercising this right of control, Government have always claimed and exercised the right to carry water to non-riparian tracts of country. The very object of diverting water by means of dams has been to enable them to do this. It could not of course be suggested that, for the purpose of exercising their right of control, Government would be warranted in committing an act of trespass; but no question of this sort arises in the present case.

The rights of Government with regard to controlling the water of a natural stream stand upon a different footing from their rights to interfere with the water of artificial channels, in which easement rights have been acquired by third parties. The distinction is pointed out by Innes, J., in *Ponnusawmi Tevar* v.

The Collector of Madura(1). In referring to the channel which in that case the plaintiff alleged had been obstructed to his detriment, the learned Judge observed (page 29): "If this were a natural stream, the right to which the plaintiff lays claim to receive a flow of water unobstructed would be natural right and not an easement." The judgment of both the learned Judges in that case proceeded on the view that the evidence established that the plaintiff had acquired rights by way of easement against the Government. It is further to be observed that in *Ponnusawmi Tevar* v. *The Collector of Madura*(1), the result of the diversion had been to cause damage to the plaintiff. Mr. Rangachariar on behalf of the appellants relied on a passage in the judgment of Sir Colley Scotland, C.J., in the case to which we have just referred on page 19. "The arbitrary power claimed for the Government in the 9th para. of the first defendant's written statement has been rightly held by the Civil Judge not to be maintainable. However lawful the exercise of such a power may be in regulating the distribution of water amongst ryotwary villages held immediately of the Government or to the lands of proprietors or their tenants, whose enjoyment of it is simply permissive, there can be no doubt that the right to an easement in the flow of water through an artificial watercourse is as valid against the Government as it is against a private owner of land." It seems to us that all that the learned Judge here laid down was that easement rights may be acquired against Government in the waters of an artificial stream. In the same case in dealing with natural channels, Innes, J., observed on page 29:—"I quite admit that the Government of this country has at all times assumed to itself and has the right in the interests of the public to regulate the distribution for use of any portion of the water flowing in the natural channels in which rights have not as yet been acquired, and to this extent the claim of the first defendant on behalf of the Government in the 9th para. of his written statement cannot be gainsaid."

We do not find anything in the judgments in the case in *Ponnusawmi Tevar* v. *The Collector of Madura*(1), in conflict with the proposition advanced by the Advocate-General that, in this country, a riparian owner has no higher rights as against the Government in regard to works of irrigation carried out by the

(1) (1869-70), 5 M.H.C.R., 6.

Government in connection with a natural stream than that of not being damaged by any diminution in the supply of water which he has been accustomed to utilise.

In *Kristna Ayyan* v. *Venkatachella Mudali*(1), the question that arose was with reference to rights in artificial streams. There it was held that the rights of the plaintiffs were limited to the beneficial enjoyment of the water for the irrigation and other necessary purposes of their tenancies as heretofore enjoyed and an injunction was refused on the ground that no right of the plaintiffs had been invaded, no damage had accrued and no case of prospective damage had been made out. We find in the judgment of the Privy Council in *Madras Railway Company* v. *Zemindar of Carvatenagarum*(2), an authority for these two propositions :— 1. Maintenance of works of irrigation is a duty cast upon Government. 2. Rights and liabilities of Government in connection with irrigation works are not governed by the same principles as those which regulate the rights and liabilities of private individuals. In this case the rights and liabilities of Government had devolved upon the defendant. Sir Robert Collier observed on page 385 : " The rights and liabilities of the defendant appear to their Lordships much more analogous to those of persons or corporations on whom statutory powers have been conferred and statutory duties imposed." See also the judgment in *Ambalavana Pandara Sannathi* v. *Secretary of State for India in Council*(3). The principle that the Government in connection with the upkeep and extension of irrigation works are in a position analogous to that of persons and corporations acting under statutory powers was developed by Sir Subramania Aiyar, J., in a passage in his judgment in *Sankaravadivelu Pillai* v. *Secretary of State for India in Council*(4), in which in dealing with the question of the position of Government as analogous to that of persons acting under statutory powers the learned Judge observed (page 79) : " The task of arriving at a conclusion as to the permissive or imperative character of an authority in a given case being by no means free from difficulty even where it depends solely on the words of a statute, that must obviously be the more so where the conclusion has to be arrived at with reference to unrecorded custom and

(1) (1871-74), 7 M.H.C.R., 60. (2) (1873-74) L.R., 1 I.A., 364.
(3) (1905) I.L.R., 28 Mad., 542. (4) (1905) I.L.R., 28 Mad., 72.

practice very rarely brought up for discussion and decision before Courts and with reference to which only the rights and obligations of the State in this country in regard to public irrigation have to be postulated. Having regard to all the considerations bearing on the question, the only correct conclusion would seem to be that so far as the construction of new works is concerned the authority is but *permissive*, while as regards the maintenance of works once completed so as not to interfere with the existing rights of other persons, the authority of the Government is *imperative*."

In *Sankaravadivelu Pillai* v. *Secretary of State for India in Council*(1), the plaintiffs sustained material damage and this, in our view, was sufficient to give them a cause of action. This being so, it is not necessary for us to consider whether the distinction which the learned Judge drew between " permissive " and " imperative " authority is well founded or whether the analogy to statutory powers should be developed as the learned Judge developed it.

The plaintiffs' contention that any interference by Government with the waters of a natural stream in the course of carrying out irrigation works, even though it does not affect the amount of water which riparian owners have been accustomed to utilise, is an invasion of certain natural rights in them does not seem to be sustainable under the law of this country. The case of *Aiyavu Mooppan* v. *Sawminatha Kavundan*(2), where the question arose between private riparian owners is not in conflict with the proposition put forward by the Advocate-General. The same observation applies to the case of *Rama Odayan* v. *Subramania Aiyar*(3). Further in the case last cited it is obvious that the total blocking up of the channel must necessarily have caused damage to the plaintiff. The decision in the case of *The First Assistant Collector of Nasik* v. *Shamji Dasrath Patil*(4), was based on the special ground that there was evidence in that case to raise the presumption of an original *animus dedicandi* in favour of the plaintiffs' village. But it was not disputed in that case that the amount of water coming to the plaintiffs' village had been diminished. The learned Judges without expressing any opinion assumed for the sake of argument that the Government have the right to regulate

(1) (1905) I.L.R., 28 Mad., 72. (2) (1905) I.L.R., 28 Mad., 236.
(3) (1908) I.L.R.,, 31 Mad., 171. (4) (1883) I.L.R., 7 Bom., 209.

in the interest of the public the enjoyment and benefit of water. This case is certainly not an authority for the contention that the interference by Government without causing damage gives a right of action.

The rights of Government as distinguished from the rights of private individuals are recognised by the Legislature in section 2 (*a*) of the Indian Easements Act, 1882, which provides: "Nothing herein contained shall be deemed to affect any law not hereby expressely repealed; or to derogate from (*a*) any right of the Government to regulate the collection, retention and distribution of the water of rivers and streams flowing in natural channels, and of natural lakes and ponds, or of the water flowing, collected, retained or distributed in or by any channel or other work constructed at the public expense for irrigation."

A further argument urged on behalf of the appellants was that when the Ramnad and Sivaganga Estates were permanently settled, the proprietary rights in streams were granted to them by Government subject to certain easement rights in the parties who had been previously supplied with water from the old Vadagarai channel, and that it was one of the incidents of the grants that there should be no interference with the waters of the Vaigai. It seems to us that the grant was subject to the paramount rights of Government to control the water of the stream for the purpose of irrigation subject to the limitation mentioned. It was also contended that the rights of Government to control the irrigation furnished by the waters of a natural stream, subject to the limitation that they invaded no acquired rights and did no damage to individuals, depended on their ownership of the bed of the stream. We are prepared to hold that the paramount right of Government under the law of this Presidency is independent of the ownership of the bed of the stream. We also think that no distinction can be drawn between cases where the interest said to be affected is that of ryotwary tenants and where the interest which is said to be affected is that of holders of proprietary estates. We also think that where the plaintiffs allege that their rights have been infringed by reason of irrigation works carried out by Government the onus is on the plaintiffs to show that they have sustained damage. Even assuming that the onus is on the defendant to show that the plaintiffs have not been damaged we are of opinion that the evidence adduced by the defendant is

sufficient to discharge the onus. We are of opinion that the proposition of law, as formulated by the Advocate-General in the Court below is well founded.

In the view we take as to the rights of Government, it is unnecessary for us to consider the rights of the plaintiffs and the obligation of the defendant, treating the case as though it had been an action brought by a lower riparian owner against a private upper riparian owner. The case, however, was elaborately argued from this point of view and it seems desirable to state the conclusions at which we have arrived. There are difficulties in the way of regarding either the plaintiffs on the one hand as entitled to certain rights as against upper riparian owners, or the defendant on the other hand as entitled to certain rights as against lower riparian owners, since the defendant has admittedly used the waters of the Vadagari channel for the benefit of non-riparian tenements and the plaintiffs have likewise, as it seems to us, used the waters of the stream for the benefit of non-riparian owners.

The plaintiffs allege (see paragraph 8 of their plaint), that their natural and easement rights have been infringed. Appended to section 7 of the Indian Easements Act or illustrations of the rights of which easements are restrictions. Illustration (*h*) refers to the rights of a lower riparian owner as against an upper riparian owner in these terms: "The right of every owner of land that the water of every natural stream which passes by, through or over his land in a defined natural channel, shall be allowed by other persons to flow within such owner's limits without interruption and without material alteration in quantity, direction, force or temperature; the right of every owner of land abutting on a natural lake or pond into or out of which a natural stream flows, that the water of such lake or pond shall be allowed by other persons to remain within such owner's limits without material alteration in quantity or temperature." We think here 'interruption, means such interruption as results in material alteration in quantity. This is borne out by the wording of illustration (*j*), which refers to the rights of an upper riparian owner against a lower. The illustration is in these terms: "The right of every owner of land abutting on a natural stream, lake or pond to use and consume its water for drinking, household purposes and watering his cattle and sheep; and the right of every such owner

to use and consume the water for irrigating such land, and for the purposes of any manufactory situate thereon, provided that he does not thereby cause material injury to other like owners." In our view the evidence shows that the plaintiffs' easement rights (if any) have not been infringed. If the plaintiffs' natural rights are wider than any rights which they have acquired by way of easement or could acquire by prescription, these rights are in our opinion subject to the paramount right of Government which would otherwise be altogether nullified.

Viewing the case as between a lower, and an upper, riparian owner, the Advocate-General's proposition was that where the water had been diverted by the upper riparian owner for riparian purposes, the lower riparian owner had no cause of action unless he could prove damage and he contended that this was the law of England and also the law of this country. He conceded that under the law of England, where the water had been diverted by the upper riparian owner for non-riparian purposes, it was not necessary for the lower riparian owner to prove damage in order to establish a cause of action.

In *Kensit* v. *Great Eastern Railway Company*(1) Baron Pollock with reference to a passage in Kent's commentaries which he cites at length observes (page 571): "That seems to me to be perfectly clear, and to be quite sufficient to express what are the rights of the parties in the present case. Taking that judgment of the Court in *Wood* v. *Waud*(2) and again in *Embrey* v. *Owen*(3), I find that doctrine very clearly established, and I certainly find no countenance in any of the judgments by any of the learned Judges in those cases for the proposition, that an action will lie by a riparian proprietor if there has been no diminution in quantity or purity of the water." This case was affirmed on appeal in *Kensit* v. *Great Eastern Railway Co.*(4). The principle that there must be actual damage was recognised in *Bailey & Co.* v. *Clark, Son and Morland*(5) where the Court of Appeal, reversing the decision of Byrne, J., being satisfied that the abstraction of water by the upper riparian owners had not been such as to cause sensible injury to the lower riparian owner, held that the defendants ought not to be restrained from abstracting water. The

(1) (1883) L.R., 23 Ch.D., 566 at p. 571. (2) 3 Ex., 748.
(3) 6 Ex., 353. (4) (1884) L.R., 27 Ch.D., 122. (5) (1902) 1 Ch., 649.

judgment of the House of Lords in *John White & Sons* v. *J. & M. White*(1) does not conflict with the principles of the decision in the case last mentioned. In *Debi Pershad Singh* v. *Joynath Singh*(2) a case decided by the Privy Council, the right claimed by the upper riparian owner was to dam up as much of the stream as he pleased and it is difficult to see how the exercise of such an alleged right could fail to cause damage to the lower riparian owners. We do not find anything in the judgments of the House of Lords in *Swindon Waterworks Company* v. *Wilts and Berks Canal Navigation Company*(3) which is in conflict with the proposition advanced by the Advocate-General. The Lord Chancellor said on page 707: "There was, therefore, upon the filing of the bill, as it appears to me, a case clearly established, that the supply of water for the canal, arising out of the stream, was deficient and was made deficient by, or at all events partly by, the acts of the present appellants." Lord Selborne said (page 714): "It is plain, upon the evidence, that this diversion of the water had (as it necessarily must have had) the effect of sensibly diminishing the supply of water necessary for the navigation at the very time when it was most wanted." In *McCartney* v. *Londonderry and Lough Swilly Railway*(4) Lord Lindley says on page 314 that in the Swindon Waterworks case the lower riparian owners were not in fact damaged by the defendants' operations; but this does not appear to have been the view of the learned Judges who decided the earlier case. In *McCartney* v. *Londonderry and Lough Swilly Railway*(4) where no substantial injury was shown, the upper riparian owner had made use of the water for purposes unconnected with his riparian tenement. Again in *Roberts* v. *Gwyrfai District Council*(5), the diversion by the upper riparian owner was for a purpose unconnected with his riparian tenement. Moreover in this case the effect of the interference had been to give the plaintiff more water at one season and less at another—a state of things which might well result in damage to the plaintiff. As regards *Bickett* v. *Morris*(6), the actual decision in that case was that as between the owners of the opposite banks of a river, neither owner was entitled to use the river bed in such a manner as to interfere with the natural

(1) (1906) A.C., 72. (2) (1897) I.L.R., 24 Calc., 865.
(3) L.R., 7 H.L. (E. & I.), p. 697. (4) (1904), A.C., 301.
(5) (1899) 2 Ch., 608. (6) L.R., 1 Scot. & D.A.C., 47.

right of the stream. In commenting upon *Bickett* v. *Morris*(1), *Cotton, L.J.*, in his judgment in *Kensit* v. *Great Eastern Railway Co.*(2) observes: "Then it is said that *Bickett* v. *Morris*(1) establishes this proposition, that when there is any interference with the bed of the river, this, although not causing any injury to an opposite owner or to the lower riparian owners, is ground of action. That, I think, was not the real meaning of *Bickett* v. *Morris*(1). Lord Westbury disposed of that proposition by suggesting that if that were so the building of a boat-house on a stream would give a right of action to all lower riparian owners. What was decided was that what interferes with the channel of the river was a matter which would be actionable unless the Court were satisfied that there would not be any injury resulting from it either then or at future time; and in such a case as the flow of water, which is so difficult to deal with, it would be a difficult case to determine whether what had been done would or would not produce any injury. If there was a reasonable prospect that it would produce any damage to the opposite or lower riparian owners, then that would give a right of action, although no actual injury was shown to have resulted from it." With regard to the contention that the plaintiffs assuming them to have not been actually damaged are entitled to prevent the acquisition of prescriptive rights against them (see the observations of Lindley, J., in *McCartney* v. *Londonderry and Lough Swilly Railway*(3), it seems to us that any prescriptive right which the defendant might acquire would be a right to divert so as to damage the plaintiffs and this right would only begin to accrue when damage began to be done.

The English authorities, therefore, would seem to establish the proposition advanced by the Advocate-General and to show that proof of damage is necessary where the use by the upper riparian owner is a use for the purpose of his riparian tenement, but not necessary where the use is for a purpose unconnected with his riparian tenement. If the English law is applicable and if the defendant in this case has no higher rights than those of an upper riparian owner, inasmuch as the defendant

(1) L.R., 1, Scot. & D.A.C., 47. (2) (1884) L.R., 27, Ch.D. 122 at p. 131. (3) (1904), A.C. 301 at p. 313.

has used the diverted water for purposes unconnected with his riparian tenement, proof of actual damage would not in our opinion be necessary in order to give the plaintiffs a right of action. But, as we have pointed out, the rights of Government in this case in our opinion are higher than those of a private upper riparian owner.

In America where the physical conditions approximate much more closely to the conditions which obtain in this country than to English conditions the doctrine of "appropriation" by an upper riparian owner, which is unknown to the English law, has been recognised to a considerable extent (see Kinney on Irrigation—Appropriation of waters). Further the law of America would appear to differ from the law of England with reference to the question of proof of damage where water has been diverted for a nonriparian purpose. In Farnham on Waters, page 1648, it is stated that "give the lower owner a ground of complaint, the quantity taken to the nonriparian land must be sufficient to inflict a perceptible injury on him."

The question whether the American doctrine is applicable in this country was elaborately discussed by Mookerjee, J., in *Belbhadur Pershad Singh* v. *Sheikh Barkat Ali*(1): The American authorities were fully considered by the learned Judge and the effect of his decision would seem to be that in Bengal the doctrine of appropriation cannot be accepted as part of the law. The learned Judge held that the use of the water for purposes of irrigation was artificial or extraordinary even when it was found that the country was dry, rocky and parched and that it was absolutely necessary that the lands which were paddy lands, should be irrigated from the watercourse in order to produce paddy and that a mandatory injunction should be granted to compel the restoration of the watercourse to its natural form. It has to be observed, however, that in that case the upper riparian proprietor had erected a bank across the watercourse, the effect of which was to cut off completely the supply of water to proprietors lower down. The ground on which Mookerjee, J., based his conclusion was "that the total consumption for irrigation by one riparian owner of the water of the stream, so that other proprietors are entirely deprived of the use of

(1) (1906-7), 11 C.W.N., 85.

WHITE, C.J., AND PINHEY, J.

FISCHER v. THE SECRETARY OF STATE FOR INDIA.

the water, must be regarded as an unreasonable use" (see page 99). Rampini, J., after referring to a passage in Angell on Watercourses, section 121, in which it is pointed out that according to the Supreme Court of Illinois in arid climates water for irrigation is referred to the class of '*natural* wants' observes: "Whatever may be the law or the future developments of the law in other countries than this, I can only say that no such rule has yet been laid down in this country."

Although this question is one of the great interest and importance, we do not feel called upon in this case to express any opinion with regard to it.

The question whether an upper riparian owner is entitled to divert water provided the amount diverted does not exceed the amount which he has himself by artificial means put into the stream does not appear to have received much discussion in England.

In Kinney on Irrigation, page 253, the law of America is thus stated: "Where water from an artificial ditch is turned into a natural watercourse and mingled with the natual waters of a stream, whether the same is the stream from which it was originally taken or not, for the purpose of conducting it to another point lower down, to be there used by the original appropriator, it is not thereby abandoned, but may be taken out and used by the parties thus conducting it, provided that they do not in so doing diminish the quantity of the natural waters of the stream by taking out more than their share, to the injury of those who have previously appropriated such natural waters."

We are of opinion that the defendant as a riparian owner was entitled to divert so much of the water as he put into the stream before it reached the lower proprietor, if in so doing he did not injure a lower riparian owner.

As we find the plaintiffs did not sustain damage by reason of the works carried out by Government in the exercise of their rights of control over works of irrigation, we hold that the suit was rightly dismissed by the Subordinate Judge and we dismiss this appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Sankaran-Nair and Mr. Justice Abdur Rahim.

THANDAVAROYA PILLAI AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

SHUNMUGAM PILLAI (PLAINTIFF), RESPONDENT.*

1908. October 15. November 3.

Hindu law—Joint family, right of to manage charities—Such right until partition vests in the senior male member of the family.

Where the right to manage charities, without any beneficial interest in the charity properties, is vested in a joint Hindu family the senior male member of such a family is, until a partition is effected, entitled to exercise the right of management vested in the family on its behalf.

Until partition is effected, no junior member is entitled to management by rotation, in the absence of an agreement recognising such right; nor is it competent to a Court to decree such a right on the ground of convenience.

APPEAL against the decree of W. Gopalachariar, Subordinate Judge of Trichinopoly, in Original Suit No. 20 of 1905.

Suit for possession of immoveable property attached to a charitable institution at Iyempoliem and for accounts or, in the alternative, to a declaration of plaintiff's right to joint possession along with defendants Nos. 1 and 2.

Plaintiff and second defendant were the undivided sons of the first defendant. The property described in the plaint schedule formed the endowment of Sri Dandayuthapani temple at Iyempoliem, the management of which vested in the family.

Plaintiff's case was that in 1902 disputes arose between plaintiff and defandants regarding partition of family properties, that the matter was referred to arbitration, while a suit (Original Suit No. 12 of 1902) regarding family properties was pending in the District Court, and that the arbitrators passed an award on 4th November 1902 deciding that, until the disposal of the suit and until a final partition was effected, the family properties should be enjoyed in three lots (thugams) each sharer taking one and that the management of the endowment should be enjoyed by each member in rotation for a year with liability to account for the income and expenditure.

* Appeal No. 41 of 1906.

Defendants denied the arbitration and the award, and urged that, in the presence of certain mediators, the parties themselves entered into a temporary arrangement on the distinct understanding that, on the disposal of suit No. 12 of 1902, a final partition was to be effected. They also urged that the said suit was finally decided in April 1904 and that plaintiff, not having taken steps to arrange a partition, was entitled to no relief. It was urged that first defendant, as managing-member, had the sole right to manage the temple property and that he was not bound to render an account to plaintiff.

The Subordinate Judge held that there was no arbitration or award and that there was only a temporary arrangement between the party, which was to be in force only until the decree in Original Suit No. 12. He, however, held that the plaintiff, as undivided co-parcener, had a right to participate in the management and that, as the co-parceners could not work together harmoniously, the proper decree would be one directing management by rotation.

He passed a decree accordingly.

Defendants Nos. 1 and 2 appealed.

T. Rangachariar and *P. Subrahmaniam*—for appellants.

P. R. Sundara Ayyar and *T. Natesa Ayyar*—for respondent.

JUDGMENT.—The plaintiff and the second defendant with their father, the first defendant, form members of a joint Hindu family. The plaintiff claims possession of Sri Dandayuthapani temple with its endowment or in the alternative to joint possession and management of the same with the first and second defendants. The Subordinate Judge has passed a decree that the plaintiff and defendants are entitled to management in turns of one year each and that he should accordingly be put in possession of the temple and the properties attached thereto in the beginning of fasli 1316 and he has also directed the defendants to render an account to the plaintiff of their management.

The defendants appeal from this decree.

The plaintiff's case is that, on account of certain disputes between the parties, it was decided by certain arbitrators to whom the questions in dispute were referred that, until the disposal of a suit then pending and until a final partition was effected, the family properties should be enjoyed in three shares and the temple and its affairs should be managed in rotation for a year with

liability to account for income and expenditure. The defendants deny any arbitration and award and allege that there was only a temporary arrangement which was to subsist till the disposal of the suit referred to by the plaintiff. We agree with the Judge that there was no submission to arbitration nor an award by the arbitrators that, on the other hand, there was only a temporary arrangement which was to be in force only till the disposal of the proceedings in Original Suit No. 12 of 1902. Clause 3 of Exhibit A reciting that the management by turns was to go on "till the said suit was disposed of" and the evidence of defence witness No. 1 clearly support this view. The proceedings in Original Suit No. 12 of 1902 terminated on the 18th January 1904.

But the Judge has also held that, since the plaintiff has a right to participate in the management as an undivided coparcener, since the co-parceners are enjoying the private properties of the joint family separately, though undivided in interest, and as joint management will be difficult on account of the strained relations between the parties, "it seems safe to decree that the first defendant and his sons do enjoy the management in turns each for one year until the final partition is effected."

We are of opinion that this decree cannot be supported. It is admitted that the office of trustee of this temple is vested in the family, that the family has no beneficial interest and that the members are undivided.

So long as the members of a family remain undivided the senior member of the family is entitled to manage the family properties. He is also entitled to exercise the right of management vested in the family on its behalf. He is the representative of the family in whom the administration of the trust is vested. It may be open to the members of the family to limit his authority by a valid agreement as they haved one in this case with reference to their private properties. But until partition no junior member is entitled to management of the trust in rotation any more than he is entitled to such possession or management of any family property. No instance where any such right has been recognized has been brought to our notice. The only case we are aware of where a right of joint management was enforced is the one of *Purappavanalingam Chetti* v. *Nullasivan Chetti*(1). But that decision was

(1) (1862-63), 1 M.H.C.R., 415.

SANKARAN-NAIR AND ABDUR RAHIM, JJ.

THANDAVA-ROYA PILLAI v. SHUNMUGAM PILLAI.

based on the ground that, as two brothers were in joint management, the son was entitled to succeed his father in such management. It has been decided in *Sri Raman Lalji Maharaj* v. *Sri Gopal Lalji Maharaj*(1) that even the divided members of a Hindu family are not entitled to claim rights of exclusive management and superintendence in rotation for any definite period as decreed by the Subordinate Judge in this case. This decision has been approved in *Ramanathan Chetty* v. *Murugappa Chetty*(2). *A fortiori*, such a claim would be untenable before partition. In *Ramanathan Chetty* v. *Murugappa Chetty*(2) the dispute arose after partition and the rights of the parties were based upon an arrangement made by them. We are therefore of opinion that the decree of the lower Court must be reversed. We accordingly set it aside and dismiss the suit with costs throughout.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

1908. September 22, 23.

PALANI KUMARASAMIA PILLAI AND ANOTHER (DEFENDANTS), APPELLANTS IN BOTH,

v.

UDAYAR NADAN AND OTHERS (PLAINTIFFS), RESPONDENTS IN BOTH.*

Civil Procedure Code, Act XIV of 1882, *ss.* 483, 491, 561—*Where attachment made on insufficient grounds, party injured can recover general damages—A memorandum of objections under s.* 561, *if not moved, ought to be dismissed.*

An order of attachment under section 483 of the Code of Civil Procedure, found by the Court, under section 491, to have been made on insufficient grounds, must necessarily cause damage to the credit and reputation of the party against whom the order is made; and such party is entitled, in a suit for damages, to general damages for loss of credit and reputation where the attachment is obtained maliciously and without reasonable and probable cause:—

Quære:—Whether in such a suit malice and want of reasonable and probable cause must be proved.

(1) (1897), I.L.R., 19 All., 428. (2) (1904), I.L.R., 27 Mad., 193 at p. 201.

* Second Appeals Nos. 1431 and 1432 of 1905.

WHITE, C.J., AND ABDUR RAHIM, J.

KUMARASAMIA PILLAI v. UDAYAR NADAN.

The Court has jurisdiction over a memorandum of objections presented under section 561 of the Code of Civil Procedure, although it is not stamped or moved by the respondent at the hearing of the appeal, and where it is not so stamped or moved, the proper order is to dismiss it, with or without costs, at the discretion of the Court.

SECOND APPEALS against the decree of W. W. Phillips, District Judge of Tinnevelly, in Appeal Suits Nos. 544 and 545 of 1904, respectively, presented against the decree of B. Cammaran Nair, Subordinate Judge of Tuticorin, in Original Suit No. 28 of 1903.

The first plaintiff is the father of minor plaintiffs Nos. 2 and 3. A suit for money was brought against the plaintiffs by the defendant, who, on certain allegations, applied for and obtained an order for attachment before judgment of certain fibre belonging to plaintiff. On notice of attachment being given, the plaintiff appeared and showed cause and the attachment was withdrawn.

The plaintiffs, on the allegation that the attachment was applied for maliciously and without reasonable and probable cause, sue to recover Rs. 2,586, *i.e.*, Rs. 2,000 as damages for loss of credit and reputation and Rs. 586 for other losses.

The District Munsif found that the attachment was malicious and without reasonable and probable cause and awarded Rs. 120 for loss of credits and Rs. 280 for other items, with full costs. Both parties appealed to the District Court. The defendant's appeal was dismissed; on the appeal of the plaintiff the District Judge upheld the finding that the attachment was malicious and without reasonable and probable cause and modified the decree by awarding sums aggregating Rs. 506.

The defendants appealed to the High Court. The plaintiffs (respondents in the High Court) put in a memorandam of objections under section 561 to be stamped and moved at the hearing of the appeal.

Sir *V. Bhashyam Ayyangar* and *T. V. Muthukrishna Ayyar* for appellants.

P. R. Sundara Ayyar and *A. S. Balasubrahmania Ayyar* for first respondent.

JUDGMENT *In Second Appeal No.* 1431 *of* 1905.—It is not necessary for us to decide whether, in a case where the Court finds under section 491 of the Code of Civil Procedure that an attachment under section 483 was applied for on insufficient grounds, the party against whom the order for attachment was made in a suit for compensation must prove that the defendant acted maliciously.

In the present case the lower Appellate Court finds on the facts that the first defendant acted maliciously and without reasonable and probable cause.

The lower Appellate Court awarded the plaintiff Rs. 256 by way of special damages and a further sum of Rs. 250 for general damages for loss of credit and reputation. Sir V. Bhashyam Ayyangar has contended that general damages are not recoverable. He conceded that he had not been able to find any authority in support of this contention. It seems to us that an order under section 483, Civil Procedure Code, where the application has been made on insufficient grounds, must necessarily cause damage to the credit and reputation of the party against whom the order is made, and we think general damages are recoverable. The principle of the decision in *Quarts Hill Gold Mining Company* v. *Eyre*(1) is, in our opinion, applicable to a case of this sort.

The second appeal is dismissed with costs.

On behalf of the first respondent a memorandum of objections was filed in this Court and a copy of the memorandum served upon the appellants under section 561 of the Civil Procedure Code. Mr. Sundara Aiyar, who appeared for the respondent, did not move his memorandum of objections and he contended that, in these circumstances, the Court had no jurisdiction to make any order with regard to it. His contention was that there was nothing before the Court with which it could deal judicially. A party may file his memorandum of objections without stamping it as it is not one of the documents to which section 6 of the Court Fees Act applies. Under section 16 of the Act the Court cannot hear the objection until the proper stamp fee has been paid by the respondent. In the present case the memorandum of objections was not stamped, but though not stamped, it is before the Court and the Court, in our opinion, has jurisdiction to deal with it, and the Court cannot be deprived of this jurisdiction because the respondent refrains from moving it. To hold otherwise might work serious hardship to an appellant. On receiving a copy of the memorandum of objections an appellant may incur costs in connection with the memorandum in order that he may be prepared to fight it. Rule 88 of the Appellate Side rules expressly provides that, when a memorandun has been filed, the appellant may file an additional

(1) (1882), 11 Q.B.D., 674.

list of documents which he desires to have translated and printed. If the Court has no jurisdiction to deal with a memorandum of objections which has not been moved an appellant may have to pay out of his own pocket costs which he has incurred on account of the memorandum of objections, which the respondent, for his own purposes, refrains from moving. The practice as to the form of order when a memorandum of objections has not been stamped and has not been moved, does not seem to be uniform, but orders dismissing the memorandum, in such circumstances, have been made and we are of opinion there is jurisdiction to make the order. If there is jurisdiction for making an order dismissing a memorandum of objections, there is of course jurisdiction to make an order dismissing it with costs. The memorandum of objections in the present case is dismissed with costs.

In Second Appeal No. 1432 *of* 1905.—This second appeal is dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Wallis and Mr. Justice Pinhey.

1908. November 4, 5, 17.

KULLAN

v.

EMPEROR.*

Criminal Procedure Code of Act V of 1898, *s.* 339—*Full and true disclosure by approver—No condition precedent to pardon—Procedure on trial of approver.*

Under section 339 of the Code of Criminal Procedure of 1898, the making of a full and true disclosure by the approver, is not a condition precedent to the pardon but making an incomplete and false disclosure is a condition subsequent by which the pardon, which has become operative before such disclosure, is forfeited. There is no necessity for withdrawing the pardon and such withdrawal has no effect.

Queen-Empress v. *Ramasami*, [(1901) I.L.R., 24 Mad., 321], considered.

Queen-Empress v. *Sudra*, [(1892) I.L.R., 14 All., 336], followed.

Queen-Empress v. *Nattu*, [(1900) I.L.R., 27 Calc., 137], followed.

Where a pardon is tendered and the approver is afterwards put on his trial, he ought to be asked if he relies on the pardon as a bar to his trial; and if he does so rely, the prosecution should first prove that the pardon has been forfeited

* Criminal Appeal No. 579 of 1908.

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by an incomplete or false disclosure. When this course is not adopted, the conviction is illegal and will be set aside.

King-Emperor v. *Bala*, [(1901) I.L.R., 25 Bom., 675], followed.

King-Emperor v. *Kothia*, [(1906) I.L.R., 30 Bom., 611], followed.

The transaction is one of the utmost good faith and the approver commits a breach of the condition if he fails to make a full and true disclosure throughout. The condition is broken if he withdraws before the Sessions Court or on cross-examination statements made before the Committing Magistrate or in his examination in chief respectively.

CRIMINAL appeal presented against the conviction and sentence of A. Edgington, Sessions Judge of Salem Division, in Calendar Case No. 65 of 1908.

Four persons were tried for murder in the Sessions Court of Salem in Sessions Case No. 94 of 1907. The accused was taken as an approver and a pardon was tendered by the Sub-Magistrate with the sanction of the District Magistrate. The approver having contradicted in the Sessions Court the statements made before the Magistrate, the District Magistrate withdrew the pardon and the accused was tried under section 339 of the Code of Criminal Procedure on the charge of murder and convicted by the Sessions Judge. The prisoner appealed to the High Court.

The Acting Public Prosecutor in support of the conviction.

JUDGMENT.—In this case a pardon was tendered to the appellant by the Committing Magistrate under the orders of the District Magistrate. The appellant was then examined as a witness before the Committing Magistrate and at the trial before the Sessions Judge when he retracted the evidence previously given by him in such a manner as to lead to the acquittal of some of the accused. Thereupon the District Magistrate under whose authority the pardon had been granted, acting apparently on the authority of *Queen-Empress* v. *Ramasami*(1) purported to withdraw the pardon and the appellant was subsequently tried and convicted of dacoity, the offence of which a pardon had been tendered. In the Sessions Court he appears to have pleaded his pardon, and to have relied mainly on the contention that the District Magistrate was not the person authorised to withdraw it. The learned Public Prosecutor has, however, on appeal, very rightly directed our attention to the Bombay decisions in

(1) (1901) I.L.R., 24 Mad., 321.

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King-Emperor v. *Bala*(1) and *Emperor* v. *Kothia*(2) which, if they are correct, show that the pardon was still in force and that the trial was illegal.

The question depends upon the true construction of section 339 as it now stands in the Criminal Procedure Code of 1898, but with a view of arriving at a correct construction, it seems desirable to trace the various changes by which the section came to assume its present form.

In England the practice has been and still is to allow an accomplice to turn King's evidence as it is called on a promise of pardon if he makes a full and true disclosure, and if he fails to do so no pardon is granted him, and until a pardon is granted him he cannot plead it in bar of the trial. *The King* v. *Garside*(3). It is there pointed out that the most the Court before which he is indicted could do, if he claimed to have earned his pardon by making a full and true disclosure, would be to adjourn the case to enable him to apply for a pardon. The difficulties which have arisen under the Code of Criminal Procedure could therefore never have arisen in England.

In India tender of pardon was dealt with by sections 209 and 211 of the Code of 1861. Act XXV of 1861, section 211, empowered the Court of Session at the time of trial and also the Sudder Court as a Court of reference, if of opinion that the person who had accepted an offer of pardon had not conformed to the conditions under which it was tendered to order his commitment. The amending Act VIII of 1869 substituted a new section 211 empowering the Magistrate before the committal or the Court of Session at the time of trial or the High Court as a Court of reference to order the committal. In the next Code Act X of 1872, section 349, conferred the like power on the Magistrate before the trial, the Sessions Judge before judgment has been passed and the High Court as a Court of reference or revision, and contained this further provision. "The statement "made by a person under pardon which has been withdrawn "under this section may be put in evidence against him." The words "withdrawn under this section" which make their appearance for the first time can only refer to the order of committal to

(1) (1901) I.L.R., 25 Bom., 675. (2) (1906) I.L.R., 30 Bom., 611.
(3) 2 A. & E., 266.

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be made by the Committing Magistrate, Court of Session or High Court under the section. In *The matter of the Petition of Nobin Chundra Banikya*(1) decided on the 20th February 1882, Maclean, J., declined to be bound by an order of committal made by a Sessions Judge under the section and set aside the conviction which had ensued. Whether in consequence of this decision or not, the Code passed in that year Act X of 1882 no longer empowered Magistrates, Sessions Judges and High Courts to commit if it appeared to them that the conditions of the pardon had not been complied with but provided merely that "Where a "pardon may be tendered under section 337 or section 338 and "any person who has accepted such tender has not complied "with the condition on which the tender was made, he may be "tried for the offence in respect of which the pardon was tendered, "etc." If the section had stopped there it would clearly have been open to the approver to plead the pardon in bar of trial and the Court would have been bound to adjudicate on it. The section, however, went on "The statement made by a person who has accepted "a tender of pardon may be given in evidence against him when "the pardon has been withdrawn under this section." This is in effect a reproduction of the similar provision in the Act of 1872 except that the expression "a person under pardon" is replaced by "a person who has accepted a tender of pardon" but whereas in the Act of 1872 'withdrawn' clearly meant withdrawn by the Committing Magistrate, the Sessions Judge or the High Court as the case might be, in the Act of 1882 it was neither specified by whom the pardon was to be withdrawn nor was there any indication as to what the effect of such withdrawal should be. In this state of things Straight, J., as we understand him, held in *Queen-Empress* v. *Ganga Charan*(2) that making a full and true disclosure was a condition precedent to the right to pardon (p. 90) and that where a pardon has been tendered and accepted and not withdrawn it could be pleaded in bar of further proceedings, the fact that it had not been withdrawn being taken as proof that the condition had been complied with. In that case the pardon had not been withdrawn, but in *Queen-Empress* v. *Mulua*(3) where the Sessions Judge had purported to withdraw the pardon

(1) (1882) I.L.R., 8 Calc., 560. (2) (1889) I.L.R., 11 All., 79.
(3) (1892) I.L.R., 14 All., 502.

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and had wrongly put the approver back into the dock and tried him along with the other prisoners, Edge, C.J., and Blair, J., in directing him to be retried observed at p. 508 that should he plead his pardon in answer to the first charge of robbery it would have to be carefully considered thus indicating that in spite of the withdrawal it was open to plead the tender of pardon and the compliance with the condition in bar of further proceedings. In *Queen-Empress* v. *Sudra*(1) the subsequent trial of the approver was alluded to as a trial for the alleged breach of the conditions on which the pardon was tendered, which assumes that the approver had been pardoned and that it was for the prosecution to show that he had forfeited the pardon by committing a breach of the condition on which it was granted, in other word that making a full and true disclosure was not a condition precedent to the pardon, but making an incomplete and false disclosure was a condition subsequent forfeiting the pardon. This is not the view we should have been disposed to take under the Act of 1882, but it must be borne in mind in considering the effect of the change introduced in 1898. The next case is *Queen-Empress* v. *Manick Chandra Sarkar*(2) in which the Court observed in answer to a reference from the Sessions Judge that it was for the authority which granted the conditional pardon to withdraw it, but had no occasion to consider what the effect of such withdrawal would be on the right of the approver to plead the pardon. This was in 1897. Next year, while the present Code was being passed, the Select Committee amended section 339 by substituting the words "forfeited under this section for" withdrawn under this section. In *Queen-Empress* v. *Ramasami*(3) (December 1900) a case subsequent to the amendment, Benson, J., in a judgment in which Davies, J., concurred, followed. *Queen-Empress* v. *Manick Chandra Sarkar*(2) in holding that it was for the authority who granted the pardon to withdraw it, without adverting to the substitution of 'forfeited' for 'withdrawn,' and held further that if the authority granting the pardon was satisfied that the condition had been broken he had authority to withdraw it. Under the amended section, however, it does not appear that there is any necessity for withdrawal or that withdrawal has any effect. After the approver has given

(1) (1892) I.L.R., 14 All., 336. (2) (1897) I.L.R., 24 Calc., 492.
(3) (1901) I.L.R., 24 Mad., 321.

evidence the prosecution can proceed with the case against him if they choose and he can plead pardon in bar of the trial, and the only question appears to be, is making a full and true disclosure a condition precedent which the approver has to prove to establish his right to pardon according to the view taken in *Queen-Empress* v. *Ganga Charan*(1) under the Code of 1882, or his failure to make such full and true disclosure a condition subsequent determining or forfeiting the pardon which was apparently the view taken in *Queen-Empress* v. *Sudra*(2) which is followed in *Queen-Empress* v. *Natu*(3) decided subsequently to 1898. Now the use of the word 'forfeited' in the present section in our opinion shows that the latter is the construction now favoured by the legislature. Forfeiture originally meant fine or punishment and was applied to the loss of property which was one of the consequences of a conviction for felony. Then it was extended to any loss sustained by a grantee on breach of the condition of his grant, as where a lease is said to be forfeited by breach of the conditions thereof. Both in law and ordinary parlance the word denotes depriving a man of some thing he has already got. An approver cannot in our opinion be said to forfeit a pardon unless he has already been pardoned. If so it is for the prosecution to prove that the pardon has been forfeited. This is the view taken in *King-Emperor* v. *Bala*(4) and *Emperor* v. *Kothia*(5) with which we agree on this point.

It may, in certain cases, be difficult for the prosecution to discharge the burden, but, on the other hand, it would be even harder for the approver if it were put upon him. In this connection, however, we desire to express our concurrence with the remarks of Benson, J., in *Queen-Empress* v. *Ramasami*(6) that the transaction is one of the utmost good faith, and that the approver commits a breach of the condition if he fails to make a full and true disclosure throughout. It is not enough for him to make such disclosure before the Committing Magistrate if he withdraws it in the Sessions Court or to make it when examined in chief if he withdraws it in cross-examination. As regards the procedure to be followed we think that where a pardon has been tendered and the approver is afterwards put on trial he should be asked if he

(1) (1889) I.L.R., 11 All., 79.
(2) (1892) I.L.R., 14 All., 336.
(3) (1900) I.L.R., 27 Calc., 137.
(4) (1901) I.L.R., 25 Bom., 675.
(5) (1906) I.L.R., 30 Bom., 611.
(6) (1901) I.L.R., 24 Mad., 321.

relies on it and if he says 'yes' which is a plea of pardon the issue as to the pardon should be tried first.

In the present case this has not been done, and we think that the conviction is illegal and that it must be set aside and a fresh trial ordered.

APPELLATE CRIMINAL.

Before Mr. Justice Munro and Mr. Justice Pinhey.

THE PUBLIC PROSECUTOR

v.

BONIGIRI POTTIGADU AND OTHERS.*

1908. November 26, 27. December 4.

Penal Code—Act XLV of 1860, *s.* 400—*Criminal Procedure Code, Act V of* 1892, *s.* 423 (2)—*When verdict of jury can be interfered with—Evidence necessary to prove offence under s.* 400, *Indian Penal Code—Evidence Act I of* 1872, *s.* 54.

The Court will not, on appeal, interfere with the verdict of a jury, under section 423 (2) of the Criminal Procedure Code, unless it is satisfied that the verdict is erroneous, and that such error was caused by a misdirection by the Judge or misunderstanding on the part of the jury of the law as laid down by him.

In a case under section 400, Indian Penal Code, the prosecution is bound to prove that the accused belonged to a gang, which was consciously associated for the purpose of habitually committing dacoity. The associating and the purpose of the association may be proved by direct evidence or by proof of facts from which they can be reasonably inferred.

Evidence of the commission of other offences than dacoity is only evidence of bad character and is inadmissible under section 54 of the Evidence Act.

Evidence that the accused or groups of them had been concerned in a large number of dacoities in a comparatively short space of time may be sufficient evidence of such association.

APPEAL under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused by K. C. Manavedan Raja, Sessions Judge of North Arcot Division, in Sessions Case No. 55 of 1907.

The accused were tried before the Sessions Court of North Arcot for offence under section 400 of the Indian Penal Code. The jury unanimously returned a verdict of not guilty and the

* Criminal Appeal No. 542 of 1908.

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accused were acquitted. The judgment of the Sessions Judge is as follows:—

"The jury return a unanimous verdict of not guilty with the remark that the evidence does not establish the existence of a gang of persons associated for the purpose of committing dacoities habitually. There is abundance of evidence to establish that the Korachas are a class of habitual *criminals*, but there is no proof of a combination having for its object the commission of dacoities. There are no special reasons to discredit the approvers' story that most of the dacoities had been committed by the Korachas with or without other criminal classes. For this they are liable for prosecutions under section 395, Indian Penal Code, and, as a matter of fact, several of the accused have had convictions under that section. The gangs, engaged in the several expeditions referred to in paragraph 20, may perhaps be successfully prosecuted separately under section 400, Indian Penal Code. But the evidence is not sufficient to prove either continuity in the operations or any necessary connection between one series of dacoities and another so as to justify the inference of a common gang composed of all the accused, such as is contemplated by section 400, Indian Penal Code. The evidence adduced does not establish any peculiar characteristic of the association of which the accused are members so as to distinguish it from other similar communities such as Sugalis, etc. I accept the verdict and acquit the accused.

"There is a second charge against them under section 401, Indian Penal Code. This has been stayed, as a joint trial was considered irregular."

The Government appealed to the High Court under section 417 of the Criminal Procedure Code.

The Public Prosecutor for appellant.

JUDGMENT (MUNRO, J.).—The thirty-nine accused were tried by a jury for an offence under section 400, Indian Penal Code, and were found not guilty and acquitted. Against the acquittal the present appeal has been filed by the Government.

Before we can interfere with the verdict of the jury, we must, under section 423 (2) of the Code of Criminal Procedure, be satisfied that the verdict is erroneous, and if so, that it is erroneous owing to a misdirection by the Judge, or to a misunderstanding

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on the part of the jury of the law as laid down by him. The latter alternative may be left out of account in this case, as there is no contention that the jury misunderstood the law as laid down by the Judge.

In a case under section 400, Indian Penal Code, the prosecution is bound to prove that the accused belonged to a gang which was consciously associated for the specific purpose of habitually committing dacoity. The associating and the purpose of the association may be proved by direct evidence, such as evidence that the accused, or the accused and others, met and determined to join together for the purpose of habitually committing dacoity. Such direct proof will, however, be rarely forthcoming, and it is not contended that there is such proof in the present case. In the absence of direct evidence the associating and the purpose of the association may be established by proof of facts from which they may be reasonably inferred, and it is such proof that the prosecution claims to have given. Evidence has been adduced to show—

(1) That the accused with one exception are more or less closely related.

(2) That the accused move about in batches, have been arrested in batches, and are absent from home in batches.

(3) That the accused commit dacoities in a uniform manner.

(4) That the accused in batches commit crimes other than dacoities.

(5) That the accused have rescued one another from lawful custody.

(6) That the accused have been seen under suspicious circumstances.

(7) That the accused have been concerned in a large number of dacoities.

With regard to (3) I agree with the Sessions Judge that there is nothing to show that the manner in which the accused are said to have committed dacoities is peculiar to them.

With regard to (4) it may at least be doubted whether evidence to show that the accused had committed crimes other than dacoities would be relevant to the present charge. Such evidence is really evidence of bad character and is excluded by

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section 54 of the Evidence Act, for the bad character of the accused is not a fact in issue in the present case.

With regard to (6) the prosecution has no ground for complaint as to the manner in which the Sessions Judge placed the matter before the jury. He rightly stated that, if members of the gang were found in groups under suspicious circumstances immediately before or after a dacoity, evidence to that effect would be relevant.

With regard to (1), (2) and (5) it has to be remarked that the accused are Korachas. Korachas are a wandering tribe, and even when engaged in lawful avocations they wander about in groups. Being members of such a tribe and being more or less united by ties of blood, it is not to be wondered at that they should rescue each other from custody when occasion arose. The evidence as to (1), (2) and (5) has thus much less weight than it might otherwise have and the Sessions Judge was perfectly right in pointing this out to the jury.

Then remains (7). If there were sufficient reliable evidence that the accused or groups of them had been concerned in a large number of dacoities in a comparatively short space of time, it might not improperly be inferred from that evidence alone that that they were members of a gang associated for the purpose of habitually committing dacoity. In a case like the present where there is no direct proof of any associating for the purpose of habitual dacoity, such evidence is absolutely essential. The charge is drawn up as if the gang had been in continuous existence from 1877 to 1907. The Public Prosecutor preferred however to endeavour to show the existence of a gang from 1898 from which year dacoities are said to have been more numerous. He complained of the manner in which the evidence regarding these dacoities had been presented to the jury, and contended that the Sessions Judge in addition to pointing out the dacoities in which each of the accused was said to have taken part, should have also stated to the jury which of the accused were said to have been concerned in each dacoity so as to bring out the feature of association. We therefore asked the Public Prosecutor to deal with the dacoities in the latter manner. He did so with the result that our conclusion was that, if the evidence had been so placed before the jury, they would probably have been unfavourably impressed rather than otherwise. The number of dacoities said to have been committed

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by some or other of the accused from 1898 to 1906 is 21. In 12 of these the only evidence to implicate any of the accused is the evidence of the approvers, and it is admitted that, save in two of these 12 cases, it was not even suspected at the time the dacoities took place that Korachas were concerned. In another case the only corroboration of the evidence of the approver is the statement of prosecution witness No. 94 that the ninth accused was one of the dacoits. The dacoity was in 1900. It does not appear that the witness saw the ninth accused again before 1907, and little weight can be given to the identification. In another alleged dacoity only the fifth accused was convicted, and not for dacoity but for robbery. In another dacoity, accused Nos. 1, 2, 4 and 5 were arrested but discharged, while the thirty-fifth accused was convicted. A number of other accused were said by the approver to have been concerned, but as to them there is no corroboration. In another dacoity accused Nos. 16, 17, 20, 21, 22, 24, 38 and 8 were arrested but were acquitted. In a dacoity of 1902, accused Nos. 1, 6, 7, 18, 19, 21, 22, 26 and others were said by the approver to have taken part, and evidence of identification of the above accused was given by prosecution witnesses Nos. 83, 84, 85 and 86. These witnesses do not appear to have seen the accused after the dacoity till 1907 and we should certainly hesitate to accept the identification as reliable. In the remaining four dacoities which were between 1903 and 1906, there is some evidence of identification to support the evidence of the approver. In one of these cases 7 of the accused, in another 4, and in another 7 and in the remaining one 2 of the accused are said to have taken part. There is also evidence that accused Nos. 1, 2, 4, 9, 15, 20, 23, 27, 31 and 35 have been once convicted for dacoity, while accused Nos. 10 and 24 have been convicted twice, and accused No. 30, three times.

I do not think there is such proof of complicity of the accused in dacoities as justifies the inference that they belong to a gang associated for the purpose of habitually committing dacoity. The jury, who were properly directed as to how they should deal with the evidence of the approvers, found that the evidence as a whole did not establish the existence of a gang of persons associated for the purpose of committing dacoity habitually, and I think that was a proper verdict on the evidence.

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I would therefore dismiss this appeal.

PINHEY, J.—I entirely concur in the judgment of my learned brother, Mr. Justice Munro, and have little to add on my own account.

Section 400, Indian Penal Code, appears to postulate the existence of a definite gang operating for a definite period and the object of the section would seem to be to provide for the punishment of those proved to be members of such a gang and against whom evidence is not forthcoming to convict them of specific offences of dacoity.

It seems to me the Sessions Judge detected the real flaw in the prosecution case and that under his direction the jury brought in a correct and proper verdict. The evidence did not establish the existence for over thirty years of any such gang as the section contemplates.

Even if the evidence of the three approvers could be entirely relied on it proves only that Korachas as a class are addicted to crimes against property and that periodically, more especially in seasons of scarcity, gangs that would probably be punishable under section 400, Indian Penal Code, were formed which set out on expeditions of longer or shorter duration and then dispersed As pointed out by the Sessions Judge each such gang must be separately dealt with if it is intended to apply section 400, Indian Penal Code.

The verdict was right and the appeal must be dismissed.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Miller and Mr. Justice Munro.

1908. February 18, 19, 27. April 6. May 1.

KALAVAGUNTA VENKATA KRISTNAYYA AND OTHERS (DEFENDANTS NOS. 1, 3 AND 4), PETITIONERS IN C.R.P. No. 599 OF 1906,

KALAVAGUNTA VENKATACHALAM AND OTHERS (DEFENDANTS NOS. 1 TO 4), PETITIONERS IN C.R.P. No. 600 OF 1906,

v.

KALAVAGUNTA LAKSHMI NARAYANA (PLAINTIFF IN BOTH), RESPONDENTS IN BOTH.*

Contract Act, Act IX of 1872, s. 23—Contract to make a payment to the father in consideration of his giving his daughter in marriage is immoral and opposed to public policy—Hindu Law—Asura marriage.

On the question whether a contract to make a payment to a father in consideration of his giving his daughter in marriage is to be regarded as immoral or opposed to public policy within the meaning of section 23 of the Indian Contract Act:

Held, by the Full Bench that, such a contract was immoral and opposed to public policy. Although a marriage when performed in the Asura form is valid, an agreement to pay money to the father in consideration of such marriage is not valid and the money cannot be recovered, by suit. If the money had been paid and the marriage solemnised, the money cannot be recovered back.

Visvanathan v. *Saminathan*, [(1890) I.L.R., 13 Mad., 83], considered.

Vaithyanatham v. *Gangarasu*, [(1894) I.L.R., 17 Mad., 9], considered.

Dholidas v. *Fulchand*, [(1898) I.L.R., 22 Bom., 658], followed.

PETITIONS under section 25 of Act IX of 1887 to revise the decrees of N. Lakshmana Rao, Subordinate Judge of Kistna at Ellore, in Small Cause Suits Nos. 1353 and 1615 of 1905, respectively.

The Civil Revision Petition first came on for hearing before Wallis and Munro, JJ., who made the following order of reference to the Full Bench:—

ORDER OF REFERENCE TO FULL BENCH.—In this case the plaintiff sues to enforce one of the terms of an award made by the panchayatdars who effected a partition between himself and his brothers. As the plaintiff had lost his wives whilst still a youth, the award,

* Civil Revision Petition Nos. 599 and 600 of 1906.

dated the 15th July 1886, provided that a fresh marriage should be celebrated at the expense of all the brothers and they should take upon themselves the responsibility of celebrating the marriage, search for a bride, pay the expenses required therefor in four shares, that is to say, other expenses excepting jewels, and have the marriage celebrated. The plaintiff did not marry until 1902 when he was between forty and fifty and had to pay a bride price of Rs. 500 which took the form of a conveyance for land worth that amount to the father of the girl aged ten whom he obtained in marriage. He has now sued one of the brothers under the award for a share of the marriage expenses including the bride price and has obtained a decree. It is now contended for the appellants that the award so far as it involves payment of bride price is illegal and void. This in our opinion involves the question whether an agreement with the father of a girl for a payment to him in consideration of giving his daughter in marriage should be regarded by the Court as "immoral or opposed to public policy" within the meaning of section 23 of the Indian Contract Act. If so by the terms of the section the object or consideration of the agreement is unlawful and the agreement itself is void. If the agreement with the bride's father be for an unlawful object, then so much of the award in this case as obliges the plaintiff's brothers to enter into such an unlawful contract or to contribute to the payments made thereunder must also be unlawful, although in other respects the award may be enforced (*Pickering* v. *Ilfracombe Railway Co.*(1)).

If the point were not covered by authority we should have no hesitation in holding that such agreements for payment to a father in consideration of his giving his daughter in marriage are immoral and opposed to public policy whether the question be approached from the standpoint of Hindu Law or of justice, equity, and good conscience which we are bound to administer. It is no doubt true that, when a father gives his daughter in marriage in consideration of such a payment, the marriage is valid. Seeing that this form of marriage is a survival from less civilised times and is still common among some sections of the Hindu community as well as for other reasons Hindu Law has been unable to go so far as to refuse to recognize the validity of such marriages and has been compelled

(1) (1868) L.R., 3 C.P., 250.

to tolerate them. Such contracts with a father are none the less opposed to Hindu conceptions of morality, and the statement of Mr. Ghose at page 604 of his Hindu Law that it is certainly not allowable according to the Smritis to give or receive a price for the bride is abundantly borne out by the convenient collection of texts appended to the chapter in which this statement occurs. Not only is this not one of the approved forms of marriage, but it has received the opprobrious name of *asura* or demon marriage as one unfitted for human beings. From the other standpoint, it is clearly opposed to the dictates of justice, equity, and good conscience to allow a father to make a profit out of the fulfilment of the duty imposed upon him by Hindu Law of finding a suitable husband for his daughter, and such contracts by a father would appear to be more and not less objectionable than marriage brocage contracts entered into by persons not having any special duty towards, or interest in, the parties to be married. The Bombay decisions ending with *Dholidas* v. *Fulchand*(1) are in accordance with this view, and a similar view was expressed by Garth, C.J., in *Ramchand Sen* v. *Audaito Sen* and *Srinath Sen*(2), where it was unnecessary to decide the point. The decision in that case that money paid to a father may be recovered back if the marriage does not take place may be supported if the agreement be held illegal on the ground that money paid under an executory illegal agreement may be recovered back when the illegal agreement has not been executed.—Leake on "Contracts," p. 672—3rd edition.

In *Visvanathan* v. *Saminathan*(3), however, a contract to pay a father Rs. 400 for giving his daughter in marriage was enforced, and the Court declined to hold that in the present state of society the receipt by a Hindu father of money in consideration of giving his daughter in marriage is in every case without distinction immoral or contrary to public policy, and laid down that each case must be decided on its own merits. We feel great difficulty in following this decision, which throws upon the Court the duty of holding an enquiry as to all the circumstances of each case. Such an enquiry would, we think, be very objectionable as the Court might be called to go into all sorts of embarrassing questions, and there would be no well-established standard by which the propriety

(1) (1868) I.L.R., 22 Bom., 658 at p. 662.
(2) (1884) I.L.R., 10 Calc., 1054.
(3) (1890) I.L.R., 13 Mad., 83.

of the particular agreement could be tested. In considering whether any particular contract is illegal the Courts have generally considered whether the tendency of such contracts if enforced would be adverse to morality or public policy, rather than the precise amount of mischief which would be likely to result from enforcing the particular contract before the Court. We think this is the right way to approach the question and we agree with the observation of Farran, C.J., in *Dholidas* v. *Fulchand*(1). "If this Court were to enforce such a contract when the amount is small and in accordance with caste principles it would, I think, be impossible to treat other contracts of a similar kind but differing only in amount as unenforceable." In view of the fact that the decision in *Visvanathan* v. *Saminathan*(2) has been referred to without disapproval in *Vaithyanatham* v. *Gangarazu*(3) and has been followed in *Baldeo Sahai* v. *Jumna Kunwar*(4), and as the question is important we have resolved before deciding this case to make the following reference to a Full Bench :—

"Is a contract to make a payment to a father in consideration of his giving his daughter in marriage to be regarded as immoral or opposed to public policy within the meaning of section 23 of the Indian Contract Act?"

The case again came on for hearing in due course before the Full Bench constituted as above.

E. V. R. Sarma for petitioners in both.

K. Subrahmania Sastri for respondent in both.

When the Court expressed the following :—

OPINION (Sir ARNOLD WHITE, C.J.).—The question which has been referred to us is "Is a contract to make a payment to a father in consideration of his giving his daughter in marriage to be regarded as immoral or opposed to public policy within the meaning of section 23 of the Indian Contract Act?"

I am of opinion that our answer to this question should be in the affirmative.

I should have had little hesitation in coming to this conclusion had it not been for the fact that in *Vaithyanatham* v. *Gangarazu*(3), in which the judgment was delivered by Sir Muthuswami

(1) (1898) I.L.R., 22 Bom., 658 at p. 662.
(2) (1890) I.L.R., 13 Mad., 83.
(3) (1894) I.L.R., 17 Mad., 9.
(4) (1901) I.L.R., 23 All., 495.

Ayyar, the learned Judges would appear to have approved of the decision in an earlier case (*Visvanathan* v. *Saminathan*(1)), in which a contract to make a payment to a father in consideration of his giving his daughter in marriage, the marriage having taken place in the *Asura* form, was held to be enforceable. There can be no doubt that the contract which was held to be contrary to public policy in *Vaithyanatham* v. *Gangarazu*(2) was a marriage brocage contract, in the ordinary acceptation of the term, whilst in *Visvanathan* v. *Saminathan*(1) the contract was with the father. Further, I do not think it can be said that the Judges who decided (*Visvanathan* v. *Saminathan*(1)) intended to limit this decision to cases where the marriage had taken place in the *Asura* form. There are general observations in the judgments in *Visvanathan* v. *Saminathan*(1) which go to show that the learned Judges were of opinion that the English rule of law was not applicable, apart from any question of the form of the marriage, and Sir Muthuswami Ayyar in *Vaithyanathan* v. *Gangarazu*(2) did not dissent from those observations. Sir Muthuswami Ayyar based his decision on two grounds, viz., "that the justice of the rule of public policy is open to no question, and that no established usage precludes its application except in the case of a money payment agreed to be made to the father of the girl in the *Asura* form." The learned Judge appears to have intended to limit his exception to cases where the marriage took place in a form which necessarily involved a money payment to the father. Although it may be, that as regards the particular case in which the present order of reference has been made, the question does not arise, we cannot answer the question, in the general form in which it has been referred to us without deciding whether the rule does or does not apply when the marriage is in the *Asura* form. It is to be observed that the learned Judges who decided (*Vaithyanathan* v. *Gangarazu*(2)) were not considering the general question which we have to decide but the special question whether the earlier decision, where the marriage had been in the *Asura* form, was good law. The question arose for consideration in the Bombay High Court in *Dholidas* v. *Fulchand*(3). In his judgment in that case Tyabji, J., after referring to the authorities,

(1) (1890) I.L.R., 13 Mad., 83.
(2) (1894) I.L.R., 17 Mad., 9.
(3) (1898) I.L.R., 22 Bom., 658.

WHITE, C.J., MILLER AND MUNRO, JJ.

VENKATA KRISTNAYYA v. LAKSHMI NARAYANA.

said "The above authorities seem to me to establish conclusively that a promise to pay money to a Hindu father, in consideration of his giving his son or daughter in marriage, cannot be enforced in a Court of law. It is no doubt true, however, that the *Asura* form of marriage, which is legal among the lower castes, is nothing more than the purchase of a wife from her father by the husband. It has, therefore, been contended that so long as such a form of marriage is permitted, payment of money to the father of a boy or girl cannot be illegal and must be enforced. I agree, however, with Scott, J., in thinking that this argument is not well founded, for though the *Asura* form of marriage when actually performed may be recognised as valid, it does not follow that an agreement for such a marriage would be legally enforced. Manu himself denounces it strongly, and lays it down in section 24 that "the ceremonies of *Asura* must never be performed." I think, therefore, that though the money if actually paid to the father in consideration of the marriage cannot be recovered back when once the marriage is solemnized, it by no means follows that a suit to recover the money, where it has not been paid, would lie." I think this is the better view and I am prepared to adopt it.

In my opinion a question of this sort should be decided on general principles and not with reference to the special terms of a particular contract. I entirely agree with the observation in the order of reference that an enquiry in each case as to whether, having regard to the terms of the particular contract, the contract is or is not contrary to public policy would be very objectionable.

I would answer the question in the affirmative.

MILLER and MUNRO, JJ.—We agree and have nothing to add.

APPELLATE CIVIL.

Before Mr. Justice Sankaran-Nair and Mr. Justice Pinhey.

VAIDYANATHA AIYAR AND ANOTHER (DEFENDANTS NOS. 1 AND 2), APPELLANTS,

v.

AIYASAMY AIYAR AND OTHERS (PLAINTIFF AND DEFENDANTS NOS. 3 TO 9 AND 11 TO 21), RESPONDENTS.*

1908. October 8, 9. November 9 to 11, 16.

Hindu Law joint family—Partition—Partial partition—Limitation Act, Act XV of 1877, sch. II, arts. 62, 127—When debts recovered by one member after division in status, right of other members to recover their shares, falls under art. 62 and not 127—Funeral expenses, liability for.

Where a partial partition is proved or admitted to have taken place between members of a Hindu family, the presumption is that there has been an entire partition both with reference to rights and properties. Where the greatest portion of the properties have been divided, and where the parties subsequently continue to live separately and have separate accounts, and there is no managing member of the family and no reason is shown why they should have been continued joint in respect of the other properties, the parties must be considered as having become divided in status.

Where the members of a joint family become divided in status, no member has a right, on behalf of the others, to recover any debt due to the family; and where it is so recovered, it is not joint family property, so as to entitle another member to recover his share by partition within the period provided by article 127 of schedule II of the Limitation Act. The article applicable in such a case is article 62 and a suit, brought more than three years after the recovery of the debt, by another member for his share will be barred by limitation.

Arunachalam v. *Ramasamya*, [(1883) I.L.R., 6 Mad., 402], followed.

The principle that the possession of one tenant-in-common is to be deemed possession on behalf of all, and limitation begins to run only after the exclusion of any tenant-in-common or after adverse possession is set up, will not apply in the case of joint families after a complete separation in status, as no member can then legally represent the others.

Where, however, at the time of such division, one of the members is a minor and continues undivided from and under the guardianship of another, who afterwards collects certain debts due to the family, it will not be open to the guardian to say that he did not realise the minor's share of the debt on his behalf, as it was his duty to protect the minor's interest and he would have been guilty of dereliction of duty if he had omitted to do so. Where therefore he collects any such debts, he will be considered to have recovered the minor's share on behalf of such minor and the minor can recover his share within the period provided by article 127 of the Limitation Act.

* Appeal No. 137 of 1905.

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The funeral expenses of the mother are defrayable out of the family funds; but where, at the partition, an agreement is made regarding such expenses, the divided member who, at his expense, performs such funerals, cannot recover contributions from the others except under the terms of such agreement.

APPEAL against the decree of T. M. Rangachariar, Additional Subordinate Judge of Tanjore, in Appeal Suit No. 137 of 1905.

Suit for partition.

The facts of the case are sufficiently set out in the judgment.

The plaintiff's case was that, after the partition of 1892, his branch and the first defendant continued undivided in respect of the properties claimed in the plaint, that after his (plaintiff's) father's death in 1893, the first defendant was in possession as manager and that he was entitled to sue within the period prescribed by article 127 of schedule II of the Limitation Act, for the recovery of his share of the outstandings collected by first defendant.

The first defendant's case was that the division was complete and that he was not in possession as manager on behalf of the first defendant and that as regards the outstandings collected by him, plaintiff's right was barred by article 62 of schedule II of the Limitation Act. The debts in question were collected before 1900 in which year plaintiff became major and the suit was instituted in 1904, more than three years after plaintiff attained majority.

The Subordinate Judge decreed for plaintiff.

The defendants Nos. 1 and 2 appealed. The main grounds of appeal were—

The Subordinate Judge should have held that the plaintiff's claim in respect of the outstandings recovered by the other sharers is barred by limitation.

The first defendant's branch and the plaintiff's branch having become completely divided from the branches of defendants Nos. 3 to 14 and defendants Nos. 15 to 21 the Subordinate Judge should have held that the claim of the two latter to a share in the monies recovered by the members of the other branches and appropriated by them was barred by limitation.

The Subordinate Judge was wrong in holding that, after the date of the division of 1892 when the parties became completely divided, there was any presumption that transactions entered into by the first defendant were on behalf of the family.

SANKARAN-NAIR AND PINHEY, JJ.

VAIDYANATHA AIYAR v. AIYASAMY AIYAR.

The Hon. The Advocate-General and *T. R. Venkatrama Sastriar* for appellants.

The Hon. Mr. *V. Krishnaswami Ayyar*, *T. Subrahmania Ayyar* and *A. S. Balasubramania Ayyar* for first respondent.

V. C. Seshachariar for fourteenth, eighteenth and nineteenth respondents.

R. Kuppuswami Ayyar for third and eighth respondents.

L. A. Govindaraghava Ayyar for thirteenth and fifteenth to seventeenth respondents.

V. Purushothama Ayyar for second, fourth to seventh and ninth to twelfth respondents.

JUDGMENT.—The suit is one for partition. There were five brothers who were members of an undivided family. Defendants Nos. 3 to 14 are the descendants of the eldest brother Sitarama Aiyar. Defendants Nos. 15 to 21 are the descendants of another brother Srinivasa Aiyar. The third brother's name is Ramasami Aiyar. The plaintiff is the adopted son of the fourth brother Gopala Aiyar. The first defendant was the youngest of the brothers. In the year 1874 Ramasami Aiyar obtained his share and divided from the rest of the family (exhibit VI). In 1892 there was a partition amongst the other brothers of properties yielding between Rs. 30,000 and Rs. 40,000 a year. Gopala Aiyar, the adoptive father of the plaintiff, continued to be the managing member on behalf of the family of the properties left undivided till his death in April 1893. Then the first defendant became the manager. Disputes arose in the course of his management, and there was a reference to arbitration (see exhibit C) in October 1893 of all claims in dispute. The family jewel-box and the box containing the documents relating to the debts due to the family were delivered to the arbitrators by the first defendant; but no final award was ever made or any partition effected by them.

The plaintiff now sues for his share of the properties which remained undivided. The Sub-Judge has passed a decree in favour of the plaintiff for his share of the immoveable properties and the jewels and also for his share of the debts that have been recovered by the various members of the family. From this decree the first defendant appeals. The appellant takes objection to the amount that has been awarded to the plaintiff for his share of the debts realized by the others. The Subordinate

Judge finds that the following sums have been recovered by the various parties to this appeal from the debtors :—

	Rs.	A.	P.
First defendant	37,806	8	6
Third defendant	20,347	14	7
Fifteenth defendant	15,314	4	3
Plaintiff	5,842	14	10
Total ..	79,311	10	2

As each branch is entitled to a fourth share, the Subordinate Judge has decreed that those who have received anything in excess of their share should pay it to the others, that the latter might get their fourth. The first defendant has accordingly been ordered to pay to the plaintiff a sum of Rs. 13,984-15-8½, which would represent the plaintiff's one-fourth share of Rs. 19,827-14-6½ less the sum which he has realized; to pay for the same reason to the fifteenth defendant Rs. 3,993-10-3; and has ordered the third defendant to pay to the fifteenth defendant Rs. 520-0-0½.

It is contended before us by the Advocate-General on behalf of the first defendant that the plaintiff is entitled to recover only one-fourth of the amount realized by each defendant and that consequently his client is bound to pay to the plaintiff only a fourth of the sum received by him, *i.e.*, Rs. 9,000 and odd, and that the claim of the other defendants, Nos. 3 and 15, to recover their shares from him is barred by limitation as those debts were realized by the first defendant more than three years before the date of the present suit and after he ceased to be the manager on behalf of the family. If there was no real division of right in the year 1892, then there can be no doubt that so far as the properties which remained undivided in 1892 are concerned, the parties form a joint undivided family and article 127 would apply to any suit brought by any one of the members to enforce his right against the others. But if there was a division in status even with reference to the properties which were not divided by metes and bounds then the article applicable to a claim to enforce the right in a joint family property, that is article 127, would not apply. The question of fact, that it is therefore necessary to determine, is whether the members were divided in

status in the year 1892. The fourteenth issue in the case raised the question so far as the defendants Nos. 15 to 21 are concerned. The first issue raised the question whether the plaintiff became divided from the first defendant in 1892. On the first issue the Judge finds—and that finding is not disputed in appeal before us—that the plaintiff and the first defendant continued to remain members of an undivided family since 1892 up to the date of exhibit A (1901).

On the fourteenth issue there is no finding given by the Judge. But for the reasons stated it appears to be necessary to decide whether there was division of right. Now it is quite clear that all the lands that yield any income were as a fact divided in 1892. Of the immovable properties that remained to be divided in Schedule A, the Judge also finds—a finding which is not disputed before us—that all the items except 16 to 18 of the plaint schedule were allotted to various co-parceners before 1892 and the Judge by his decree confirms their right to, and possession of, the houses and house-sites so allotted. Items 16 to 18 in the plaint schedule are of very trifling value, of less than Rs. 300 as valued in the plaint.

Then in October 1893 arbitrators were appointed to make the necessary arrangements about the properties. When partial partition is admitted the presumption is that there has been an entire partition both with reference to right and properties. Here it is admitted that by far the most valuable portion of the properties have been divided. There is no reason suggested why it was to the interest of the parties that they should continue to remain a joint family with reference to the portion left undivided, the result of which would be that on the death of any co-parcener his interest would descend not to his own representatives but would survive to the other members: whereas a reason may be suggested why the other properties were not actually divided. The reference to arbitration and the conduct of the arbitrators may probably account for it. All the documents were in their possession: and, as the Subordinate Judge has pointed out, it would appear that each of the three co-parceners, the plaintiff being a minor, was trying to recover what was due to himself or his own share. The evidence shows that the parties were living separately: they had separate dealings and separate accounts. They were paying income-tax separately: and in one instance,

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though it was after the institution of the suit, each received his own share of a judgment-debt which was due to them all. If they continued to be a joint family, then there would probably have been a managing member of the family. But after the reference to the arbitration there was no managing member. Exhibit VIII shows that objection was taken to the first defendant, the senior member, recovering a debt on behalf of the rest. The present third defendant admits that after Gopala Aiyar's death there was nobody as manager of the undivided family properties though the first defendant was looking, for sometime, after the family affairs, after his death. The description of the properties referred to in Exhibit A and in Exhibit C which is relied upon by the pleader for the respondents is not of much weight. We have, therefore, no hesitation in coming to the conclusion that the parties must be treated as being divided in status since the year 1892.

Then it is contended by the Advocate-General that the debts recovered by any one of those members after such partition cannot be treated as joint family property and that the claim of any member to recover from the others his share of the money is therefore barred under article 62. In the case of *Arunachala* v. *Ramasamya*(1) the plaintiff obtained a decree against his father for partition and a declaration of his right to recover one-third of a certain debt due to the family. The debtor paid it to the father: and the plaintiff sued more than three years after the payment by the debtor to recover his share of that amount. It was held that the plaintiff's father was not a trustee for the plaintiff and his claim was barred under article 62 of the Limitation Act. Similarly in *Banoo Tewary* v. *Doona Tewary*(2) in a suit brought by certain members of a family, who became separate in 1885, to recover their share of the debts realized by some other members of the separated family more than three years after the realization, it was held that article 62 would apply and not Article 127 and the suit was held to be barred. The Calcutta High Court followed the decision in *Thakur Prasad* v. *Partab*(3) where also one of the members of a family claimed to recover his share of the debt realized by the other, four years after separation

(1) (1883) I.L.R., 6 Mad., 402. (2) (1897) I.L.R., 24 Calc., 809.
(3) (1884) I.L.R., 6 All., 442.

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and eight years after the realization of the debt by the other member, and the claim was held to be barred under article 62. These authorities seem to be directly in point. The parties before us appear to be in the same position as the plaintiff in those cases with reference to the debts realized by the other members from whom they claim their share. The case of *Tellis* v. *Saldanha*(1) appears to be stronger. The rent due under a lease executed in favour of two brothers was realized by the representatives of one of the brothers and the claim of the surviving brother to recover his share from such representatives was held to be barred three years after such recovery. In that case the parties, though Christians, lived together as members of a joint family till their status was altered by the Indian Succession Act after which also they continued to live together.

It was contended on the other side that the principle applicable to the case before us is that recognised in the case of tenants in common where one tenant in possession of the property is held to be in possession on behalf of all and it is only after the exclusion of any tenant in common, or after adverse possession is set up, that limitation begins to run in favour of the tenant in possession. This, undoubtedly, is a well-recognized principle. But, in our opinion, there is a great difference between that class of cases and the one before us. Where a member of a joint family is in possession of joint family properties and a partial partition takes place leaving him, however, in possession of certain properties not divided between them, his possession will still continue to be the possession of the other members of the family though they may have been divided, till some event happens which renders his possession exclusive or hostile to the others. This principle would also apply to any accretions to such family properties. Thus in this case certain jewels—which admittedly were joint family properties—were left in the possession of some of the members of the family and the claim of the other parties to their share is not barred by limitation. Assuming again there is only a partial partition and with reference to the other properties left undivided the family leaves its affairs in the hands of a managing member, anything done by him with reference to those properties would be on account of the

(1) (1887) I.L.R., 10 Mad., 69.

family and the same principle would apply. For instance, in the case before us, if Gopala Aiyar after the partition in 1892 had recovered any of the debts due to the family from its debtors his possession would have been the possession of the rest. And, similarly, if the first defendant, while he was the managing member after Gopala Aiyar's death and before the reference to the arbitration, had realized any of the debts, then also his possession must be deemed to be the possession of all the other members of the family and the claim by any one of them to recover his share would not be barred. But it is admitted in this case that the debts now in dispute were all realized after the first defendant ceased to be the managing member. After the division in status of the members of a family one of them does not represent the others. He is not bound by the dealings of the others with reference to any property in which a person may be interested. Thus after 1892 no member of the family can recover the debt or any portion of the debt that may be payable to the other members. Their right against any debtor would stand uneffected by any payment to him and if any member as a joint creditor recovers the debt he becomes liable immediately to pay over the share of his joint creditor to him. This also explains the case of *Ganesh Dutt Thakoor* v. *Jewach Thakoorain*(1). There, as expressly stated by their Lordships, it was not the case of either party that there was a partial separation or a separation in respect of certain properties only and the debts therefore realized by the brothers were realized on account of their family; the only question was whether one of the brothers, as whose representative his widow claimed a partition, was separated in interest or continued an unseparated member. There was no claim advanced by any one of the members, to the debts realized, to the exclusion of the other members of the family. In the case before us, as already pointed out, the debts were not recovered or realized by the first defendant or any of the other brothers as the representative of the family or on behalf of the other members as well. We are, therefore, of opinion that article 62 applies.

It was then argued by Mr. Govindaraghava Ayyar that the plaintiff and the first defendant continued to be members of an

(1) (1904) I.L.R., 31 Calc., 262.

undivided family even after 1892, though the others may have become separated; and therefore the realization of the debts by the first defendant must be taken to have been not only on his own account but on behalf of himself and the plaintiff who was a minor under his guardianship. And as the first defendant has, therefore, realized more than what is due to himself and to the plaintiff, the plaintiff is not entitled to proceed further and claim anything from the other defendants, that is the third and fifteenth defendants.

The first issue raised the question "Whether the plaintiff's branch became divided from the first defendant's branch in the year 1892", and the Subordinate Judge has found that they did not become so divided. If the first defendant and the plaintiff were members of an undivided family and the first defendant was the guardian in law of the plaintiff, then he was bound to protect the interests of the plaintiff. He obviously did not realize the debts on behalf of the third and fifteenth defendants, as he would then have paid the monies over to them. The proper inference derivable from the facts of the case is that drawn by the Subordinate Judge, that "there was a general scramble after the failure of the arbitration and each collected what he could." It would have been a dereliction of duty on the part of the first defendant not to have realized the share of the plaintiff.

If the suit had been brought against the first defendant by the third and fifteenth defendants during the minority of the plaintiff he would have, no doubt, been entitled to claim and retain the amount realized for the shares of himself and the plaintiff: and then it would not have been open to him to say afterwards against the plaintiff that the amount was not collected on behalf of both of them. We think, therefore, Mr. Govindaraghava Ayyar's argument is sound and the plaintiff is entitled to recover from the first defendant in whose hands there is a sum of Rs. 37,000 and odd—his full share which is claimed—about Rs. 19,000 less the amount collected by himself.

The result of these findings is that the Subordinate Judge's decree directing the first defendant to pay Rs. 13,984-15-8½ to the plaintiff will stand and the decree in so far as it directs him to pay the fifteenth defendant Rs. 3,993-10-3 and the third defendant to pay the fifteenth defendant Rs. 520-0-0½ will be reversed.

The Advocate-General also contends that the first defendant is entitled to recover from the plaintiff his share of the expenses incurred by him for the funeral ceremonies of his mother. It is proved that, the first defendant as the son performed these ceremonies in the presence of the other members of the family. It is clear, of course, that if the expenses were incurred by the first defendant as the managing member he would have been entitled to defray them out of the family funds. But that is not the claim advanced. What is argued is that even after partition he is entitled to claim the contribution under an agreement and also under the Hindu Law as the other members were interested in the performance of those ceremonies. When the partition took place in 1874, it was agreed that for the expenses which should be incurred for the mother's funeral ceremonies all the five brothers should jointly fix the amount which might seem proper to them and it is only in case any sharer failed to give his share that his properties should be liable. The first defendant pleaded in this case that there was such an agreement. But in our opinion the Subordinate Judge has rightly discredited the evidence. As pointed out by him the witnesses are interested: they do not agree as to the time of the agreement nor as to the amount actually spent. Though it is proved that the other members of the family were present, there is no reliable evidence that they were ever consulted. The defendants keep regular accounts but they have not produced any to show what was spent for this purpose. The documentary evidence also is conflicting. Exhibit XIV is inconsistent with Exhibit XVII.

It is then argued by the Advocate-General that, even if he fails to prove the agreement, he is entitled to recover a reasonable contribution under the rule of Hindu Law; but it is quite clear that it is open to the parties to come to an agreement as to the expenses to be incurred; and, where there is such an agreement, as in this case the parties are bound by it. It is not alleged in this case that the first defendant asked the other parties to fix their respective contributions and they refused. Even if it is open to the first defendant to claim a reasonable contribution apart from the agreement, there is no evidence in the case to prove in the circumstances what would be a reasonable contribution. He has not proved the amount that he has actually spent: and the amount payable by each has to be determined not with reference

to the means of the person who performs the ceremonies but of the person who has to contribute and there is no evidence in this case to show what, in the circumstances, would be a reasonable amount.

It is next contended by the Advocate-General that items 20, 22, 31, 36—39, and 40 and 41 in Schedule B ought to have been held to be the sole property of the first defendant. The oral evidence to which our attention is drawn is unreliable. Though it is true that the first defendant had properties of his own, yet still he was in management of the common affairs and was in possession of the family funds. It, therefore, lies on him to show that these bonds were taken by him in his own private capacity and not on behalf of the other members. There is also the fact referred to by the Subordinate Judge that all these bonds were delivered to the arbitrators. No doubt, the first defendant now says that it was a mistake; but he has failed to prove it. And the circumstance that these bonds were kept with the other family bonds is evidence to support the contention of the respondents. We must therefore disallow his claim.

The next point argued is that the first defendant should not have been directed to pay interest on the amounts realized. But it is shown that he has utilised it in the purchase of properties and there is no reason, therefore, why he should not pay interest.

It is pointed out to us that though the Lower Court has confirmed the parties in their right to and possession of the manaikats and houses as indicated in Schedules A-1 to A-4 the appellant is not really in possession of all the properties allotted to him. Though this is not admitted by the respondents, we direct the decree to be modified by ordering that possession should be delivered to the parties, if necessary, of any property not in their possession.

The jewels were kept in an iron safe in the house occupied by some of the members of the third defendant's branch. The plaintiff and some of the defendants contend that many valuable jewels have disappeared and those who were living in the house must be held responsible for their disappearance. But there is no reliable evidence in the case as to the value of the jewels deposited or as to the period of its disappearance or the persons responsible as residents at the time of such disappearance. Though we think the judge was wrong in rejecting the list tendered by the plaintiff, we

SANKARAN-NAIR AND PINHEY, JJ.

VAIDYANATHA AIYAR v. AIYASAMY AIYAR.

do not think any reliable evidence will be forthcoming at this distance of time and it is not alleged before us that such evidence is available. We must therefore disallow the claims to recover their shares of the jewels.

On behalf of the plaintiff, it is contended that the first defendant has realized in addition to what is found by the Lower Court, a sum of Rs. 6,000 in the aggregate consisting of items 7, 10, 11, 15, 18 and 19. This contention is supported by the evidence of some witnesses which we consider interested and unreliable.

All the debts due to the family have not been recovered. There will be a declaration that the parties are entitled to their share of the debts still outstanding.

We are not satisfied that the decision about the Nandana produce is wrong or that the third defendant's branch is entitled to recover interest on the sum of Rs. 3,000.

It is further contended that the plaintiff should bring into hotchpot the jewels in the possession of Gopala Aiyar's widow. But she is not a party to the suit and the jewels were not given to her by the plaintiff.

It is unnecessary to make any declaration as to the room in the house allotted to the third defendant's branch, as their possession of the house is confirmed and if they are not in possession, they are entitled to it under the decree as now modified by us.

With the modifications above stated, the Appeal and the Memoranda of Objections are dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sankaran-Nair.

SADHU NARAYANA AIYANGAR (FIRST DEFENDANT), APPELLANT,

v.

RAMASWAMI AIYANGAR (PLAINTIFF), RESPONDENT.

1908. October 1, 2, 28.

Partner, right of, to sue for contribution—One partner, compelled to pay the whole of a partnership debt after dissolution, may sue for contribution, although right to sue for account of, and share in, the partnership assets may be barred.

A partner who, after the dissolution of the partnership, has been compelled to pay a debt due by the partnership, can maintain a suit for contribution against his co-partners, even though a suit for general account of the partnership and a share therein is barred by limitation. The defendant, however, will, in such a case, be entitled to show that in a settlement of accounts he will not be liable, or that his liability would be reduced.

Sokkanadha Vannimundar v. *Sokkanadha Vannimundar*, [(1905) I.L.R., 28 Mad., 344], principle applied.

Subbarayudu v. *Adinarayudu*, [(1895) I.L.R., 18 Mad., 134], considered.

The principle will apply equally whether the party suing is a partner or his representative.

SECOND APPEAL against the decree of W. W. Phillips, District Judge of Tinnevelly, in Appeal Suit No. 203 of 1905, presented against the decree of V. R. Kuppusami Aiyar, District Munsif of Srivilliputtur, in Original Suit No. 220 of 1904.

Suit for account of a partnership chit transaction carried on by plaintiff and first defendant, for the recovery of Rs. 12 due by the first defendant to the plaintiff in the partnership accounts and Rs. 533 for plaintiff's half share of the sum of Rs. 1,066 for which decrees were passed against plaintiff and first defendant jointly in respect of the partnership chit transactions, but which was realised wholly from plaintiff. Plaintiff also prayed that certain amounts due to the partnership may be directed to be collected jointly by the plaintiff and first defendant and equally divided between them.

The chit transactions ceased in May 1900, owing to disagreement between plaintiff and first defendant, and the suit was instituted in March 1904.

* Second Appeal No. 362 of 1906.

Defendant contended *inter alia* that the suit was barred under article 106 of schedule II of the Limitation Act.

The Munsif held the suit was not barred in respect to the right of the contribution on account of the moneys realised from plaintiff under the decree, and gave a decree for a moiety of such amount and dismissed the rest of the claim as barred. His judgment was confirmed on appeal.

The first defendant appealed to the High Court. The plaintiff filed a memorandum of objections in respect of his claim for settlement of accounts, which was held to be barred by the Lower Courts, and of interest which was disallowed.

T. Rangachariar and *C. Aiyaswamy Sastriar* for appellant.

M. A. Tirunarayana Chariar for respondent.

JUDGMENT.—The first question we have to consider is whether the suit is barred by article 106 of schedule II of the Limitation Act. In support of the memorandum of objections filed on behalf of the respondent it is contended that the suit though a suit for an account of partnership dealings is not also a suit for a share of the profits of the dissolved partnership and is therefore not within article 106.

We think however that the plaintiff seeks to recover a share of the profits. He says in effect in his plaint that he has prepared an account himself which he sets out in schedules (see paragraphs 18—20 of the plaint) and that this shows that the defendant has to pay to him two sums under circumstances set out in paragraphs 8 and 12 of the plaint (*vide* paragraph 15). But he is willing, if this should not prove correct, to pay whatever may be found due by him (paragraph 17). Finally he prays this Court to settle the accounts and direct the defendant to pay him the two sums due to him, and to direct the defendant and himself to collect whatever assets of the partnership remain outstanding, and after deducting expenses to divide the balance. This last prayer makes it clear that the plaintiff is suing for a share of the profits if any.

The suit as a suit for an account and a share is clearly barred by limitation. The next question is whether as a suit for contribution it can be maintained.

The plaintiff was compelled at the suit of certain creditors of the partnership to pay the whole amount due to them and seeks to recover from the defendants one moiety of what he has paid.

The decree and payment were after the dissolution of the partnership, but there was at dissolution no settlement of accounts.

Now this is not a case of a transaction outside the partnership: certain persons having dealings with the firm in respect of the partnership business became entitled in the course of the dealings to receive money from the firm. They sued and obtained decrees against the partners: the liability is beyond any doubt a partnership liability. The English cases referred to in *Subbarayudu* v. *Adinarayudu*(1) have therefore no application and the facts of(1) itself are not sufficiently clear either in the report or in the printed papers to enable us to say certainly that that case is on all fours with the present case. But, if that case is not distinguishable on the facts, we should find some difficulty in following it on the grounds stated in the judgment; for, it is not easy to see how the making of a decree against the partners imposes upon them any liability which did not attach to them as partners before the suit.

But in *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar*(2) a representative of a deceased partner was allowed to sue for a share of assets collected after dissolution by a surviving partner, though a suit for a general account was barred by limitation. The fact that neither partner has thought fit in proper time to secure a settlement of accounts does not, it is there pointed out, afford a reason why one partner should be enabled to secure an advantage over the other. Justice is done if the defendant is allowed to show that on a settlement of accounts he would not be liable. This principle is, we think, applicable and should be applied to the present case; the fact that here the plaintiff has paid a debt, while there the defendant had realized assets, does not affect the principle, nor are we able to distinguish this case on the ground that in *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar*(2), and the other cases which support the view there taken, the suit was by a representative of a deceased partner. The suit is therefore good as a suit for contribution, but the first defendant must be allowed to show, if he can, that on a settlement of accounts the amount payable by him as contribution is wiped out or reduced. The District Munsif has gone into the account, but the District Judge has not done so; and, unless the parties agree either to accept the District Munsif's findings or to fix

(1) (1895) I.L.R., 18 Mad., 134. (2) (1905) I.L.R., 28 Mad., 344.

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some other amount, a finding by the District Judge will be required.

The District Munsif finds that the plaintiffs was entirely responsible for the suits by the creditors as he alone declined and unnecessarily declined, to admit their claims: if this is so (the District Judge has not expressed his opinion yet), the first defendant is not liable to repay a share of the interest which the plaintiff was compelled to pay, but he should pay interest at 6 per cent. on the share due from him, from the date of payment by the plaintiff to date of payment to the plaintiff by him.

The parties agree to judgment for the plaintiff for Rs. 385 instead of Rs. 364-0-5 awarded by the District Munsif: the decree will be amended accordingly, the defendant undertaking to withdraw the appeal preferred by him against the decision of the District Munsif of Srivilliputtur in Original Suit No. 64 of 1907.

Each party will pay and receive proportionate costs throughout.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

1908. January 20. April 6. December 18.

MUTHUVEERU MUDALIAR (FIRST DEFENDANT), APPELLANT,

v.

VYTHILINGA MUDALIAR AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Hindu Law—Alienation by widow of part of her widow's estate, validity of—Consent of reversioners—Transfer by reversioner of reversionary interest—Estoppel of actual reversioner claiming through one who had given consent.

An alienation, without justifying necessity, by a widow of a portion only of her limited estate, will not be validated by the consent of the next reversioners.

Marudamuthu Nadan v. *Srinivasa Pillai*, [(1898) I.L.R., 21 Mad., 128], followed.

Bajrangi Singh v. *Manokarnika Baksh Singh*, [(1908) I.L.R., 30 All., 1], referred to.

A conveyance during the widow's life by a reversioner of his reversionary right is inoperative.

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* Second Appeal No. 379 of 1903.

WHITE, C.J., AND MILLER, J.

MUTHUVEERU MUDALIAR v. VYTHILINGA MUDALIAR.

A consent given by a reversioner, *bonâ fide*, and for good consideration, to an alienation by the widow will be binding on persons claiming through him.

Rangappa Naik v. *Kamti Naik*, [(1908) I.L.R., 31 Mad., 366], referred to.

Per *Miller, J.*—The alienation by the widow will not be good, even if made with the consent of *all* the reversioners then in existence.

SECOND APPEAL against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit No. 655 of 1904, presented against the decree of C. V. Visvanatha Sastri, District Munsif of Shiyali, in Original Suit No. 174 of 1903.

Suit for declaration and for possession of properties. These properties and others originally belonged to one Theagaraja Mudaly, who died issueless about 50 years ago, leaving his widow *S* who succeeded to the plaint properties and other properties of her husband who died on 20th October 1902.

Theagaraja had two brothers, Ponnu and Vythilinga, who survived him. Of these the latter died issueless 15 years before this suit. The plaintiffs are the grandsons of Ponnu, who is also dead. The plaintiffs claim, as reversioners entitled to Theagaraja's properties on the death of *S* to set aside alienations of part of her estate made by *S* to the defendants and to recover the properties with mesne profits.

The lands were sold by *S* to one Chokka Mudaliar and another and they sold it to the father of first defendant.

Defendants' case is that Theagaraja Mudaliar owed money to others; and that after his death, his widow executed a document in favour of her husband's brothers Ponnu Mudaliar and Vythilinga Mudaliar under which they were to take the lands and pay the debts; that these people enjoyed the lands for some time, and being unable to pay the debts Ponnu executed a document in favour of Vythilinga, under which Ponnu was to take the lands and pay the debts; that Vythilinga finding it not possible to pay the debts gave back the lands to Soundrathanni; and that Soundrathanni then sold the lands to Thiruvengada Pillai and Chokku Mudaliar in order to discharge the debts due by her husband.

Vythilinga and Ponnu also executed to Chokka Mudaliar a conveyance of their reversionary right in the properties sold by *S* which is filed as exhibit I and the material portion of which is as follows:—

"Whereas we have not discharged the debts incurred by our brother Theagaraja Mudaliar according to the deed of agreement

executed to us by the abovesaid Theagaraja Mudaliar's wife Savundarathanni on 31st Vayyasi of Pingala with the condition that the debts incurred by the said Theagaraja Mudaliar should be paid by us and that we should take the whole of his share of the property; whereas the said debt had also remained undischarged by the abovesaid Vythilinga Mudaliar, one of us, according to the terms of the agreement except to him by Ponnambala Mudaliar, one of us, on 15th Avani of Pingala with the condition that the said Vythilinga Mudaliar should pay the said debt and take exclusively for himself the whole of the said Theagaraja Mudaliar's share of property and that the said Ponnambala Mudaliar and his heirs shall have no claim in respect of the same in future; and whereas in respect of the nunja lands and gardens that have been sold to you and to your brother-in-law Subbraya Mudaliar by the said Theagaraja Mudaliar's widow Savundarathanni in discharge of the abovesaid debt which had to be urgently discharged. We have given to you, the three persons, the reversionary right that we have in the abovesaid properties, and have, in consideration of the same, received Rs. 100."

On these facts the defendants contended *inter alia* that the alienations by *S* were for justifiable purposes and cannot be questioned by plaintiffs as Ponnu and Vythilinga had consented to same.

The District Munsif held that the sale was not satisfactorily proved nor exhibit I and that there was no evidence of any justification for such sale, if any. He also held that even if Ponnu and Vythilinga had consented, the alienation would not be valid. He accordingly decreed for plaintiffs.

The District Judge confirmed the judgment of the Lower Court on the authority of *Marudamuthu Nadan* v. *Srinivasa Pillai* (21 Mad., 128).

The first defendant appealed.

The main grounds of appeal are—

The Lower Appellate Court ought to have held that after such relinquishment, the brothers of the deceased last male owner stepped into succession and the whole estate became vested in them.

The Lower Appellate Court erred in considering that the alienations made by the widow were merely with the consent of the then reversioners.

The Lower Appellate Court not having found exhibits I and VI to be other than genuine ought to have given due effect to them.

The Lower Appellate Court ought to have held that the alienations in favour of the defendants' ancestors concurred in by the nearest reversioners at the time was valid and binding on the plaintiffs.

The Lower Appellate Court has not given its finding on all the questions arising in the suit.

T. R. Ramachandra Ayyar and *S. Muthia Mudaliar* for appellant.

T. V. Gopalasawmy Mudaliar for respondents.

JUDGMENT (ARNOLD WHITE, C.J.).—Assuming exhibit I to be a genuine document and the recitals in the instrument to be true, I do not think that the effect of the transaction first recited, namely, an agreement between the brothers of the deceased and his widow that the former "should take the whole of his share of the property," operated as an effective conveyance to the brothers of the widow's limited estate by inheritance. The recital itself states that the agreement was conditional on the debts of the deceased being paid by the brothers, and the second recital (the conveyance by one brother to the other of the whole of the deceased's share of the property, on condition that the brother to whom the conveyance is recited to have been made should pay the debts of the deceased) states that the debts had not been paid by the two brothers. There is no statement in the deed that the debts have been paid by the brother to whom the last-mentioned conveyance is recited to have been made. The third recital, namely, a recital of a sale by the widow of a portion of the property is quite inconsistent with the view that she had under the transactions mentioned in the first two recitals surrendered the whole of her limited estate to the brothers or one of them. The deed purports to convey the reversionary right of the two brothers to Chokka Mudaliar, but, in the view that at the time they purported to do this the widow had not been divested of her limited estate, and the brothers had nothing more than a reversionary right, this conveyance would be ineffective. See *Manickam Pillai* v. *Ramalinga Pillai*(1) and my judgment in *Rangappa Naik* v. *Kamti Naik*(2) in which the point in question was considered by a Full Bench.

(1) (1908) I.L.R., 29 Mad., 120. (2) (1908) I.L.R., 31 Mad., 366.

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In the view I take as to the construction of exhibit I, I think this case, apart from any question of estoppel, is governed by the decision of the Full Bench in *Marudamuthu Nadan* v. *Srinivasa Pillai*(1). This decision was recently considered by the Privy Council in *Bajrangi Singh* v. *Manokarnika Baksh Singh*(2) and was cited with approval; and as pointed out in the judgment in the Full Bench case to which I have referred, although the question before their Lordships was the general question of the right of a Hindu widow, in the absence of legal necessity to alienate property with the consent of the nearest reversioners, there is nothing as it seems to me to indicate that their Lordships were of opinion that the right was free from the qualification or restriction that the whole limited estate must be withdrawn.

Apart, therefore, from any question of estoppel, it seems to me that the decisions of the Courts below were right. As regards this question of estoppel, in the recent Full Bench case to which I have referred the Judges were all of opinion that in the facts of that case the plaintiffs were estopped from setting up the invalidity of the alienation by the widow. The Judges were of opinion that they were precluded from holding otherwise having regard to the final sentence in the judgment of the Privy Council in *Bajrangi Singh* v. *Manokarnika Baksh Singh*(2).

There may be difficulties, as I observed in my judgment, in reconciling the view of the law in which the statement contained in this sentence was based, with the law as laid down in earlier cases; but as I am of opinion that, as regards the question of estoppel, the facts in the present case cannot be distinguished from those in the case referred to the Full Bench, I hold following the decision of the Full Bench that, if the alienation was in fact made and the then reversioners in fact consented to it and received consideration therefor, the plaintiffs are estopped from denying its validity.

I think therefore this case must go back to the Lower Appellate Court for a finding as to whether exhibit I is genuine, and if the finding is in the affirmative for findings as to whether Soundrathanni in fact alienated the properties in favour of Chokka Mudaliar and Subbaraya Mudaliar, and, if so, whether Ponnu

(1) (1898) I.L.R., 21 Mad., 128.
(2) (1908) I.L.R., 30 All., 1; 12 C.W.N., 74.

WHITE, C.J., AND MILLER, J.

MUTHUVEERU MUDALIAR v. VYTHILINGA MUDALIAR.

Mudali and Vythilinga Mudali consented thereto and received consideration for their consent.

Fresh evidence may be taken.

Findings should be submitted after the re-opening of the Court after the recess. Seven days will be allowed for filing objections.

MILLER, J.—The case presented to us on behalf of this appellant is that the widow Soundrathanni Ammal surrendered or relinquished her estate to the reversionary heirs of her husband, recovered it from them, and then effected this alienation now questioned. There is no evidence of this suggested recovery from the heirs after relinquishment, but the relinquishment itself we are asked to find established by exhibit I. Exhibit I, however, presuming it to be a genuine document containing true recitals does not establish the relinquishment. It recites that the brothers Vythilinga and Ponnambala Mudaliar having undertaken but failed to discharge the debts of their deceased brother Theagaraja Mudaliar according to a deed of agreement executed by them in favour of his widow Soundrathanni conditioned that they should take the whole of his property and pay all his debt, and Vythilinga Mudali having undertaken but failed to discharge the debt in pursuance of an agreement between himself and his brother, a part of the property had been sold by the widow; and the brothers apparently, by way of confirming the sale, convey to the vendee for the sum of Rs. 100 in cash their reversionary interest in the property sold. There being no mention of any recovery of the property by the widow, the sale by her is inconsistent with a prior relinquishment by her, and property construed, the document appears to recite that there was an agreement to relinquish if the brothers would pay the debts, but that, as they did not do so, there was no conveyance, and consequently the widow effected an alienation for the purpose of paying off the same debts. This seems to be the case presented in the evidence at the trial, and the relinquishment alleged in paragraph 5 of the first defendant's written statement does not appear to have been urged before the Courts below; there is no issue dealing with the question, nor do the grounds of appeal to the Lower Appellate Court suggest that that question ought to have been tried.

In these circumstances it is unnecessary to send back the case for a finding on the question of relinquishment by the widow

and the question for decision is whether assuming Exhibit I to represent the truth, the confirmation by the brothers Vythilinga and Ponnambala Mudaliar of the widow's sale is sufficient to give validity to the transfer as against the plaintiffs. It is found that there was no existing necessity sufficient to justify the sale and for the purpose of my decision I assume that the two brothers were at the time of the confirmation the only living reversionary heirs of Tyagaraja Mudaliar.

The only difference between the present case and the case of *Marudamuthu Nadan* v. *Srinivasa Pillai*(1) decided by a Full Bench of this Court is that in that case the alienation was assented to by one out of several reversionary heirs living at its date, while here all the living reversionary heirs confirmed the sale.

The law does not favour alienation by widow and the ground upon which the learned Judges put the restriction imposed by them on such alienations in *Marudamuthu Nadan* v. *Srinivasa Pillai*(1), is that it will afford a safeguard against improper alienation. It may be argued with some force that the necessity of obtaining the assent of the whole body of reversionary heirs will afford as effective a check on alienation as the rule adopted by the Full Bench. The latter rule will however operate in every case where a widow proposes to alienate for purposes other than those recognized by the law as justificatory, while the former may operate only where the body of reversioners is numerous, and is on that account not a check which can be admitted as generally sufficient. The learned Judges do not suggest in their decision that an alienation of a part only of the inheritance will be good if made to the nearest reversionary heir provided that he is at the time of the alienation the only reversionary heir. So to hold would in not unfrequent cases remove the check which it is their object to preserve.

Nor can the consent of the whole body of reversionary heirs to a partial alienation be held to supplement the powers of the widow to deal with the estate. No estimate being vested in any reversionary heir the aggregate of the assents of all is for this purpose no better than the assent of the nearest reversioner among them.

I do not of course suggest that the assent of the whole body of living kindred is not more valuable than the assent of one

(1) (1898) I.L.R., 21 Mad., 128.

member of that body. It is obviously more valuable as evidence in favour of an alienee when, it may be, evidence of the actual purpose of the transfer has ceased to be available and it may be more valuable as furnishing estoppels against subsequent attempts to upset the alienation made on the strength of it. But these considerations do not apply to the point which I am considering, the question whether, if a partial alienation to the nearest reversioner is bad, similar alienation to all the reversioners is good.

I think therefore that the present case is not taken out of the rule laid down in *Marudamuthu Nadan* v. *Srinivasa Pillai*(1) and if that decision finds us the decision of the Lower Appellate Court is right on this point. It is suggested that the decision of the Privy Council in *Bajrangi Singh* v. *Manokamika Baksh Singh*(2) virtually overrules the case in this Court; but I do not think that is so. It is true that in that case, if the facts are correctly reported, the alienation of the whole estate was effected piecemeal by the widow, but the alienations received the assent of the reversionary heirs as a whole, after all were completed, and the decision is therefore not a direct authority in favour of partial alienations.

Moreover their Lordships though they quote from the decision in *Marudamuthu Nadan* v. *Srinivasa Pillai*(1) do not suggest that they disapprove of the restriction there laid down. I think that we are still bound by that decision and must hold that the consent of Ponnu Mudaliar and Vythilinga Mudaliar is not of itself sufficient to give validity to the alienation by the widow.

Since this case was argued a Full Bench of this Court has decided that a consent given *bonâ fide* and for good consideration will bind persons claiming through the giver of the consent and if exhibit I is a genuine document and represents truly the transaction set forth in it, Ponnu Mudaliar's grandsons would be bound by his consent. It is necessary therefore to call for findings on this question, and I concur in the order made by the learned Chief Justice.

In compliance with the order of the High Court, the District Judge submitted findings that exhibit I was not genuine, that the alienations by *S* were not proved and that Ponnu and

(1) (1898) I.L.R., 21 Mad., 128. (2) (1908) I.L.R., 30 All., 1; 12 C.W.N., 74.

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Vythilinga did not give any consent or receive valuable consideration. These findings were accepted and the second appeal was dismissed with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Munro and Mr. Justice Pinhey.

1908. September 30. October 14.

VENKATA SUBBA REDDI AND ANOTHER (PETITIONERS),

v.

AYYALU REDDI (RESPONDENT).*

Criminal Procedure Code, Act V of 1898, ss. 435, 437—Sessions Judge can order further inquiry on the ground of misappreciation of evidence.

Under sections 435 and 437 of the Code of Criminal Procedure, the Sessions Judge has power to direct further inquiry by a Subordinate Magistrate when, in his opinion, an accused has been discharged by such Magistrate in consequence of an improper appreciation of evidence.

Lakshmi Narasappa v. *Mekala Venkatappa*, [(1908) I.L.R., 31 Mad., 133], dissented from.

Queen-*Empress* v. *Balasinnatambi*, [(1891) I.L.R., 14 Mad., 334], followed.

PETITION under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of K. C. Manavedan Raja, Sessions Judge of North Arcot, in Criminal Revision Case No. 7 of 1907, setting aside the order of discharge passed by the Sub-Magistrate of Wandiwash in Calendar Case No. 176 of 1907.

The facts are sufficiently stated in the judgment.

P. S. Parthasarathi Aiyangar and *G. S. Ramachandra Ayyar* for petitioners.

The Acting Public Prosecutor for the Crown.

L. A. Govindaraghava Ayyar for respondent.

ORDER (MUNRO, J.).—In this case certain persons were accused of theft and discharged by a Sub-Magistrate. The Sessions Judge on revision held that on the evidence the accused persons should not have been discharged. He therefore set aside the order of discharge and directed further inquiry. It is contended before us that the Sessions Judge had no jurisdiction to set aside the

* Criminal Revision Case No. 271 of 1908.

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order of discharge on the ground of misappreciation of evidence, and that on the merits the order of discharge should not have been interfered with.

The powers of a Sessions Judge in such a case are defined in sections 435 and 437 of the Criminal Procedure Code. Under section 435 a Sessions Judge may call for and examine the record of any proceeding before any inferior Criminal Court situate within the local limits of his jurisdiction for the purpose of satisfying himself as to the correctness, legality or propriety of any finding, sentence or order. Section 437 provides that, on examining any record under section 435, the Sessions Judge may direct further inquiry into the case of any person who has been discharged. Reading the two sections together it seems to me to be clear that the Sessions Judge may direct further inquiry in such a case if he thinks the order of discharge is incorrect, illegal or improper, and this being so, I am unable to see how it can be argued that he cannot direct further inquiry on the ground of misappreciation of evidence if, in his opinion, misappreciation of the evidence has led to the passing of an incorrect or improper order of discharge. No restriction is placed by the sections upon the grounds on which a Sessions Judge may order further inquiry, and I do not see why we should read into the sections restrictions which are not there and which are not imposed by any other provision of the Criminal Procedure Code. In *Queen-Empress* v. *Balasinnatambi*(1), the Sub-Magistrate had discharged the accused on the ground that the evidence was worthless. The Sessions Judge took a different view of the evidence and referred to the High Court the question whether it was competent to him to order further inquiry, additional evidence not being forthcoming. The Full Bench answered the question in the affirmative. There are sufficient indications in the judgments of the learned Judges that they considered misappreciation of evidence to be a good ground for ordering further inquiry, and indeed misappreciation of evidence was the ground on which the Sessions Judge desired to interfere. I am therefore of opinion that the Sessions Judge had power to set aside the order of discharge in the present case.

The objection on the merits seems to be an after thought, as no reference is made to it in the revision petition. Having,

(1) (1891) I.L.R., 14 Mad., 334.

MUNRO AND PINHEY, JJ.

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however, heard the case on the merits, I think the Sessions Judge has shown sufficient grounds for ordering further inquiry, and would dismiss the revision petition.

PINHEY, J.—The petitioners, the first of whom is the Village Munsif of Alathur, were accused of the offence of theft in a building, punishable under section 380, Indian Penal Code, and discharged by the Sub-Magistrate of Wandiwash.

Being of opinion that a *primâ facie* case had been made out against the accused and that it was for them to prove the defence they set up, the Sessions Judge, North Arcot, under section 437, Criminal Procedure Code, directed the District Magistrate to make, either by himself or by any Subordinate Magistrate, further inquiry into the case.

We are asked to revise the order of the Sessions Judge. It is contended that the Sessions Judge had no jurisdiction to set aside an order of discharge on the ground of misappreciation of evidence, as the only Court empowered to set aside a finding of fact is the High Court acting under section 439, Criminal Procedure Code.

This revision petition was, no doubt, filed in consequence of the decision of Mr. Justice Sankaran-Nair in *Lakshmi Narasappa* v. *Mekala Venkatappa*(1). Mr. Justice Wallis, sitting as Judge of the Admission Court, doubted the correctness of the above decision and directed this petition with others to be placed before a Division Bench. The decision of Mr. Justice Sankaran-Nair follows that of the Division Bench in *Queen-Empress* v. *Amir Khan*(2) and of the Calcutta Full Bench in *Hari Das Sanyal* v. *Saritulla*(3).

A perusal of the Calcutta case shows that, in the opinion of majority of the Judges, the correct procedure for a Sessions Judge or District Magistrate who disapproved of a finding of fact by a Sub-Magistrate was *not* to order further inquiry, but to refer the case to the High Court under section 437, Criminal Procedure Code. Both the decisions quoted were considered by the Full Bench of this Court which decided *Queen-Empress* v. *Balasinnatambi and others*(4), and while the former was expressly dissented from, the latter was only partially followed. Mr. Justice Sankaran-Nair dismisses the Full Bench decision of this Court with the following observation: "This Court in *Queen-Empress*

(1) (1908) I.L.R., 31 Mad., 133.
(2) (1885) I.L.R., 8 Mad., 336.
(3) (1888) I.L.R., 15 Calc., 608.
(4) (1891) I.L.R., 14 Mad., 334.

MUNRO AND PENHEY, JJ.

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v. *Balasinnatambi and others*(1) agreed with the decision of the Calcutta High Court, but did not indicate in their judgment the nature of the order to be passed under section 437 that would be appropriate to the grounds on which the revisional powers of the District Magistrate are to be exercised."

In my opinion the learned Judge has misunderstood the Madras Full Bench decision, and what he considers an omission on the part of the Judges was in fact a deliberate refusal to follow the Calcutta ruling in its entirety. Section 437, Criminal Procedure Code, makes no provision for a reference to the High Court at all. Such a reference could only be made under the general section 438. It is section 437, Criminal Procedure Code, however, that lays down the procedure to be adopted by a Sessions Judge or District Magistrate (and the High Court also) in the case of an improper order of discharge in a warrant case triable by a Magistrate, and the only procedure prescribed is an order for further inquiry. It is clear from the answer of the Madras Judges to the question referred to them that they realised the error into which the Calcutta Judges had fallen by reading into section 437, Criminal Procedure Code, matter that it did not contain. The question referred was as follows: "Whether, under section 437, Criminal Procedure Code, it is competent to a District Magistrate, Sessions Court or High Court or any of them to direct further inquiry or a retrial to be held when additional evidence is not forthcoming." All the four Judges answered in the affirmative, and three of them further intimated to the Sessions Judge who had made the reference that it was competent to him to order further inquiry under section 437 in the particular case reported for orders. This latter intimation can only have been added to mark their disapproval of the procedure indicated by the Calcutta Bench. The facts of the case in *Queen-Empress* v. *Balasinnatambi and others*(1), which are set forth in the judgment, show that the sole ground on which the Sessions Judge proposed to interfere was that the Sub-Magistrate had not properly sifted the evidence or, in other words, that he had misappreciated it. If the Madras Judges had been prepared to endorse the views of Wilson, J., in *Hari Dass Sanyal* v. *Saritulla*(2) in their entirety, it is clear that they would have

(1) (1891) I.L.R., 14 Mad., 334.
(2) (1888) I.L.R., 15 Calc., 608.

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informed the Sessions Judge that the appropriate order in the case was *not* one for further inquiry under section 437, but a reference to themselves, as they alone had power to set aside a finding of fact under section 439, Criminal Procedure Code. In fact they would have proceeded to deal with the case referred on the merits and passed the necessary orders themselves.

I am of opinion that the decision in *Lakshmi Narasappa* v. *Mekala Venkatappa*(1) is directly opposed to that of the Full Bench of this Court in *Queen-Empress* v. *Balasinnatambi*(2) and that it cannot be followed. I hold that the Sessions Judge had jurisdiction to make the order he did in the present case under section 437, and as there is no reason to suppose that he misused the discretion vested in him by law, the petition now before us must be dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Miller and Mr. Justice Sankaran-Nair.

1908. December 8.

PALANIANDY GOUNDAN

v.

EMPEROR.*

Criminal Procedure Code, Act V of 1898, s. 350—Application of section to cases withdrawn from one Magistrate and transferred to another—'Trial' what is within s. 350 (a).

The words of section 350 of the Code of Criminal Procedure are applicable to cases in which the case under enquiry on trial is withdrawn from one Magistrate, who thereupon ceases to exercise jurisdiction *therein* and is transferred to another.

A preliminary enquiry by a Magistrate into a case exclusively triable by the Court of Session is not a 'trial' before framing a charge within section 350 (*a*) and where such an enquiry is transferred, the Magistrate is not bound to rehear the case *de novo*.

Mohesh Chandra Saha v. *Emperor*, [(1908) I.L.R., 35 Calc., 457], followed.

PETITION, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of M. Abdul Hie Sahib, Head-quarters Deputy Magistrate of Salem, in a Criminal Miscellaneous Petition in Petition Revision Case No. 10 of 1908.

(1) (1908) I.L.R., 31 Mad., 133. (2) (1891) I.L.R., 14 Mad., 334.

* Criminal Revision Case No. 538 of 1908.

MILLER AND SANKARAN-NAIR, JJ.

PALANIANDY GOUNDAN v. EMPEROR.

The accused was charged with the offence of having caused grievous hurt and the Magistrate who took cognisance of the case, treated it as a 'register case' or preliminary inquiry into a case triable exclusively by the Court of Session. The District Magistrate transferred the case to the file of the First-class Sub-Divisional Magistrate of Salem and the accused (petitioner) applied that the witnesses should be examined *de novo*. The Sub-Divisional Magistrate having rejected his application, the petitioner moved the High Court under sections 435 and 439 of the Code of Criminal Procedure.

T. Anantha Chariar for petitioner.

The Acting Public Prosecutor on behalf of the Crown.

T. Subramania Ayyar for complainant.

ORDER.—We agree with the view taken of section 350 of the Code in the recent decisions of the Calcutta High Court in *The Deputy Legal Remembrancer* v. *Upendra Kumar Ghose*(1) and in *Mohesh Chandra Saha* v. *Emperor*(2), where learned Judges held that the words of that section are applicable to cases in which the case under enquiry or trial is withdrawn from one Magistrate who thereupon ceases to exercise jurisdiction *therein*, and is transferred to another. In this view the Deputy Magistrate's procedure in the present case was governed by section 350 and he was not bound to rehear all the prosecution witnesses. Nor was the accused in our opinion entitled by virtue of proviso (*a*) to section 350 to require a rehearing of the evidence.

The case before the Magistrate was a 'register case' or preliminary enquiry into an accusation of an offence triable exclusively by a Court of Session. It was not, in our opinion, a trial before the charge was framed but was an enquiry and therefore not provided for by proviso (*a*) to section 350. Even if the case were treated by the Magistrate as a warrant case the accused is not prejudiced by this construction of the section because by section 256 of the Code as soon as a charge is framed he can recall for cross-examination all the prosecution witnesses whose evidence has been taken and therefore should the proceedings become a trial he has a right equivalent to that of demanding a *de novo* enquiry.

We dismiss the petition.

(1) 12 C.W.N., 140. (2) (1908) I.L.R., 35 Calc., 457.

APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Justice Wallis, Mr. Justice Munro and Mr. Justice Sankaran-Nair.

NARAYANASWAMY NAIDU

v.

EMPEROR.*

1908. November 18, 27. 1909. January 5. February 2.

Criminal Procedure Code, Act V of 1898, ss. 435, 437, 438, 439—District Magistrate has power under s. 437 to order further inquiry when accused discharged on misappreciation of evidence—Further inquiry may be by another Magistrate.

On the question of the extent of the powers of interference of the High Court and a District Magistrate or Sessions Judge, under section 437 of the Code of Criminal Procedure, when an accused is improperly discharged on a misappreciation of evidence by a Subordinate Magistrate:

Held, by Wallis and Munro, JJ. (Sankaran-Nair, J., dissenting), (1) That the powers of interference of the High Court and the District Magistrate or Sessions Judge are co-extensive under section 437 of the Code of Criminal Procedure, and they can set aside an order of discharge for reasons other than those which will justify the High Court in interfering on revision.

(2) That the Sessions Judge or District Magistrate cannot, in the exercise of the power to order further inquiry, under section 437, himself frame the charge or order the Subordinate Magistrate to frame the charge and try the accused. The District Magistrate may, under the other part of the section, make the further inquiry himself and frame a charge in the course of such inquiry.

(3) The Sessions Judge or District Magistrate is not bound to refer the case to the High Court in a case of difference of opinion, owing to mere misappreciation of evidence but would be justified in ordering a reconsideration of the same evidence.

(4) Where the Subordinate Magistrate had dealt with the case in an unsatisfactory way, further inquiry by another Magistrate may be ordered; and such Magistrate may, if necessary, retake the evidence taken before the first Magistrate.

Hari Dass Sanyall v. *Saritulla*, [(1888) I.L.R., 15 Calc., 608], dissented from.

Per SANKARAN-NAIR, J.—Where the Sessions Judge or District Magistrate differs from the conclusion of the Subordinate Magistrate on the evidence, the only question is whether there should be a retrial and no useful purpose is served by a further inquiry. The Sessions Judge or District Magistrate must, in such cases, refer the matter to the High Court under section 438 and cannot order further inquiry under section 437.

The powers conferred on District Magistrates and Sessions Judges by section 437 are not wider than the powers conferred on High Courts by section 439.

* Criminal Revision Case No. 331 of 1908.

PETITION, under sections 435 and 439 of the Code of Criminal Procedure, praying the High Court to revise the order of A. Butterworth, District Magistrate of Trichinopoly, in Criminal Revision Case No. 2 of 1908 (Calendar Case No. 147 of 1907) on the file of the Court of the Stationary Second-class Magistrate of Udaiyárpálaiyam.

The criminal revision case first came on for hearing before (Munro and Sankaran-Nair, JJ.), who made the following Order of Reference to the Full Bench which is as follows:—

ORDER OF REFERENCE TO FULL BENCH.—The accused were prosecuted for an offence under section 223, Indian Penal Code, and discharged by the Stationary second-class Magistrate, Udaiyárpálaiyam Taluq, under section 253, Criminal Procedure Code.

The Magistrate states his conclusion after an elaborate review of the evidence in the following words: "After weighing the "evidence let in by the prosecution, I consider it is shabby and it "has not been supported by any voucher at all to prove that "the prisoner Komaran was entrusted to the custody of the two "accused now before the Court. Besides the inconsistencies in "the depositions of prosecution witnesses are so innumerable that "I can unhesitatingly place on record that the prosecution has "entirely failed to establish the offence against the two accused."

At the request of the District Superintendent of Police, Trichinopoly, in a letter addressed by him to the District Magistrate, the latter sent for the records under section 435, Criminal Procedure Code, and made the order from which the following is an extract in so far as it is material for this revision. After considering the question of the admissibility of a document rejected by the Magistrate and finally concurring with him in rejecting it, he says: "I am by no means satisfied that the Sub-Magistrate "gave reasonable consideration to the oral evidence tendered for "the prosecution. His arguments for discrediting the prosecution "evidence are not convincing and, without expressing any opinion "as to whether the first accused ought to have been convicted, I "regard the Superintendent's application for a retrial as *primâ* "*facie* reasonable. I, therefore, direct under section 437, Criminal "Procedure Code, that further enquiry be made into the charge "against the first accused. The retrial will take place before the "Sub-Magistrate of Kilapalur." He declined to interfere so far as the second accused was concerned.

An application is now made before us on behalf of the first accused to set aside the order passed by the District Magistrate ordering a further enquiry and, in the event of its not being set aside, to direct that the case should be heard by the same Magistrate who originally heard it.

In the circumstances the order of the Sub-Magistrate could be set aside only if the District Magistrate disagreed with his conclusion and held that whether the evidence is sufficient or not, for a conviction, it is strong enough to call upon the accused for his defence If the District Magistrate did not set it aside on that ground, it cannot on the face of it be supported. He must be held therefore to decide in effect that the conclusion of the Magistrate on the evidence before him is wrong and as there are no fresh considerations to be placed before the Magistrate which might influence him, the case in the interests of justice requires fresh investigation by a different Magistrate. It is to be noted, however, that he directs a further *enquiry* under section 437 and orders the *retrial* before the other Magistrate.

My judgment in the case of *Lakshminarasappa* v. *Mekala Venkatappa*(1), has been dissented from in *Venkata Subba Reddi* v. *Ayyalu Reddi*(2) by my learned colleagues Munro and Pinhey, JJ. In view of the observations made by my learned colleagues I shall state in detail my reasons in support of my decision according to which the order of the Magistrate should be set aside. Section 435 runs thus:—

"The High Court or any Sessions Judge or District Magis-"trate . . . . may call for and examine the record of "any proceeding, before any inferior Criminal Court situate "within the local limits of its or his jurisdiction for the purpose "of satisfying itself or himself as to the correctness, legality "or propriety of any finding, sentence or order recorded or passed, "and as to the regularity of any proceedings of such inferior "Court."

It will be observed that this section only empowers the Courts therein named to call for the records. But what they have to do after calling for the records and examining them is stated in sections 436—439, Criminal Procedure Code. Where the case is one for commitment, the Sessions Judge or the District

(1) (1908) I.L.R., 31 Mad., 133. (2) (1909) I.L.R., 32 Mad., 214.

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Magistrate may order it under section 436. If the case is not one for commitment, then the procedure to be adopted by the District Magistrate or the Sessions Judge is regulated by sections 437 and 438.

Section 437 runs thus:—

"On examining any record under section 435 or otherwise, ... the District Magistrate may himself make, or "direct any Subordinate Magistrate to make, further *inquiry* into "any complaint which has been dismissed under section 203 or "sub-section (3) of section 204, or into the case of any accused "person who has been discharged."

Note that the power given is to order *inquiry* not *trial*. Under section 438, the "District Magistrate may, if he thinks fit, "on examining under section 435 or otherwise the record of any "proceeding, report for the orders of the High Court the result of "such examination."

And what the High Court may do is stated in sections 437 and 439.

Now under section 253, Criminal Procedure Code, an accused is discharged—and the petitioner was so discharged—if, after taking all the evidence tendered by the prosecution, the Magistrate finds that no case against the accused has been made out which, if unrebutted, would warrant his conviction. There is, of course, nothing to prevent a Magistrate from discharging the accused at any previous stage of the case also, if he considers the charge to be groundless.

When the case so discharged is taken up by the District Magistrate on revision under section 435, he may come to the conclusion that (*a*) the case requires reconsideration, on some grounds other than a mere misappreciation of evidence, for reasons which have been held to justify the High Court in interfering in revision, for instance, for any exclusion of evidence or defective investigation or failure to consider important evidence or by reason of the Magistrate's consideration of the evidence from a wrong point of view or contravention of any provision of law, or, (*b*) he may arrive at the conclusion that the Magistrate has wrongly appreciated the evidence and that a case has been made out, in his opinion, under section 253, Criminal Procedure Code, which if unrebutted, would warrant the conviction of the accused. There is no doubt, now, after the Full Bench decision in

Queen-Empress v. *Balasinnatambi*(1), under section 437, Criminal Procedure Code, the District Magistrate or the Sessions Judge ought to pass an order for further *inquiry* in the first class of cases. He himself comes to no conclusion upon the evidence, but he only points out to the inferior Magistrate certain reasons which might lead him possibly to come to a conclusion different from that which he had arrived at. The case would be strictly one for further *inquiry*. But in the latter class of cases, he himself arrives at the conclusion that a case has been made out against the accused. Then, in my opinion, it is not a reconsideration of the evidence already taken that is required: but the proper step to be taken would be the framing of a charge and calling upon the accused to answer the charge so framed against him, when under section 256, he may claim to be *tried*. Then the accused is placed on his *trial*. The case has passed beyond the stage of *inquiry*. If the District Magistrate is himself entitled under section 437 to order a charge to be framed, he might do so himself; but if he is not entitled to order the charge to be framed under the above section, then the proper procedure is to refer the case under section 438 to the High Court; and, on such reference the High Court may under sections 439 and 423 of the code set aside the order of discharge and either frame a charge or direct the Magistrate to frame the charge and try the accused. Whether a District Magistrate has power under section 437 himself to direct the charge to be framed depends upon the question whether the word 'inquiry' in section 437 includes the trial of the accused. On this point there was a difference of opinion, though it is now settled by the Criminal Procedure Code now in force. The majority of the Judges of the Calcutta High Court under the old Code held that the word "inquiry" does not include "trial" (*Hari Dass Sanyal* v. *Saritulla*(2) and the District Magistrate therefore had not the power to frame the charge and direct the accused to be tried.

If this is the correct view, and I believe it is, then the procedure which the District Magistrate ought to adopt is, as held by Mr. Justice Wilson (*Hari Dass Sanyal* v. *Saritulla*(2)) to refer the matter to the High Court under section 438. Mr. Justice Prinsep in the same judgment (*Hari Dass Sanyal* v. *Saritulla*(2)

(1) (1891) I.L.R., 14 Mad., 384. (2) (1888) I.L.R., 15 Calc., 608, at p. 620.

took a different view. If he is right, even then, the District Magistrate himself ought to frame the charge or direct the inferior Magistrate to frame it and proceed with the trial. In neither case is the District Magistrate justified in asking the inferior Magistrate to reconsider the evidence on which he has already recorded his opinion. The legislature has now adopted Mr. Justice Wilson's view by defining "injury" the term used in section 437 to exclude a *trial*. (Section 4 (*k*) of Act V of 1898). According to this definition "inquiry" includes every enquiry by a Magistrate or Court *other than a trial*. In a case exclusively triable by a Court of Session, the trial begins only after the commitment and the charge is framed. In a summons case, the *trial* really begins when the accused is brought before the Magistrate; the particulars of the offence are stated to him and the Magistrate proceeds to hear the complaint and take the prosecution evidence—under the definition therefore this cannot be an enquiry; the trial must end in conviction or acquittal: there is no discharge. Neither the District Magistrate nor the Sessions Judge can interfere under section 437: the matter must be reported to the High Court for orders under section 439, Criminal Procedure Code. The arguments derived from the presumed necessity of entrusting these powers to the District Magistrate and the Sessions Judge do not therefore appear to be of weight. In warrant cases, if the trial begins as in summons cases and the examination of the prosecution witnesses forms part of the trial, then it is obvious that it cannot be an enquiry and section 437 does not therefore apply. The District Magistrate can only refer the case to the High Court. But it is more reasonable in my opinion to treat the proceedings after the framing of the charge as the trial and the rest as an enquiry, as held by the majority of the Calcutta High Court, and under section 437 the District Magistrate has thus no power to remit the case to the inferior Magistrate for *trial*. The High Court alone can do it under sections 439 and 423. Therefore if a *primâ facie* case is made out, the District Magistrate ought to submit the case to the High Court.

To my mind a remand of the case seems to be entirely purposeless. When the District Magistrate forms the opinion that a charge ought to be framed then it is but right and proper if the High Court agree with him that the case should be tried and the accused called upon to meet the charge even if the inferior

Magistrate or Magistrates, time and again, come to a different conclusion. I see absolutely no use then in asking the inferior Magistrate again to consider the same evidence, even if we assume, what however is not the fact, that the inferior Magistrate will not be influenced by the opinion of the District Magistrate, when no fresh argument or matter is brought before him. Even, if he comes to the same conclusion that the case is one for discharge, it is but right that the High Court should decide whether the person should not be tried, when a superior officer like the District Magistrate is of opinion that a *primâ facie* case has been made out against the accused. The remote possibility of the District Magistrate changing his first opinion does not weigh with me against the propriety of a trial and acquittal instead of a second investigation. The former is far more satisfactory in the interests of the administration of Justice. If, on the other hand, the Sub-Magistrate comes to the conclusion that a *primâ facie* case has been made out against the accused, it is simply a waste of time as he then only takes the step which should have been taken before. The case is not, therefore, one for further *inquiry* in this latter class of cases. And I am therefore clearly of opinion that the order made by the District Magistrate to reconsider the evidence already on record is wrong.

My learned brother Munro, J., is of opinion—see *Venkata Subba Reddi* v. *Ayyalu Reddi*(1)—that there is no reason to hold that a District Magistrate cannot direct further enquiry on the ground of misappreciation of evidence "if in his opinion such misappreciation has led to the passing of an incorrect or improper order of discharge."

The question is not whether a District Magistrate has jurisdiction to pass an order for further enquiry. Every judicial officer has jurisdiction to pass a wrong order as much as a right order. But if the order is one that ought not to be passed in the circumstances of the case, then it must be set aside.

I have already stated that in my view, if such misappreciation has been caused on account of defective investigation or any similar cause, then an order would be justifiable under section 437 according to the decision of the Full Bench; but if there is only a difference of opinion between the District Magistrate and

(1) (1909) I.L.R., 32 Mad., 214.

the Sub-Magistrate, then it is not a question of further enquiry in the sense in which I understand the term; but it is whether he should not be charged and tried at once: and for that purpose the case should be referred to the High Court or steps taken by the District Magistrate himself if he has power under section 437. This is not, in my opinion, a matter for further enquiry but for trial.

My second reason for this conclusion is that the only reported authorities on the point are in favour of this view. In the case of *Hari Dass Sanyal* v. *Saritulla*(1), Wilson, J., who expressed the opinion of the majority of the Judges, held that where the District Magistrate is satisfied that there is a case for charging and trying the accused, then he ought to refer the case to the High Court and not direct further inquiry by the Magistrate. To the same effect is the case of *Queen-Empress* v. *Amir Khan*(2). In the judgment in *Venkata Subba Reddi* v. *Ayyalu Reddi*(3), my learned colleagues held that this judgment has been dissented from in *Queen-Empress* v. *Balasinnatambi*(3). As Mr. Justice Pinhey thinks the question is concluded by this decision, it requires a fuller examination than what I considered necessary in my previous judgment. In that case the following question was referred to the Full Bench: "Whether under section 437, "Criminal Procedure Code, it is competent to a District Magis-"trate, Sessions Judge or High Court or any of them to direct "further enquiry or a retrial to be held where additional "evidence is not forthcoming." It will be observed that section 437 only refers to a further *enquiry* which by its definition excludes a *trial* and the Full Bench decision in so far as it holds that a trial, as now understood, can be ordered under section 437 is no longer law. It is further clear from the order of reference that the only question before the Full Bench was: whether a further enquiry can be directed under section 437 where any additional evidence is not forthcoming: and the High Court held that a further enquiry could be directed even where additional evidence is not forthcoming. But whether in the absence of such evidence a further enquiry may not be precluded for any other reason was not, and could not be, properly before them. And with all

(1) (1888) I.L.R., 15 Calc., 608, at p. 621.
(2) (1885) I.L.R., 8 Mad., 336.
(3) (1909) I.L.R., 23 Mad., 214.
(4) (1891) I.L.R., 14 Mad., 334.

respect to my learned colleagues I do not think the High Court in that case really decided the question now before us.

It may be that misappreciation of evidence was the ground on which the Sessions Judge made an order in that case and the question, now in dispute, probably might have been raised; but unless the question was raised for decision and discussed or an opinion is clearly expressed by the Full Bench, we are not to seek indications in the judgment of what might have been their opinion, if the question had been properly presented to them for decision. The High Court cannot obviously treat such indications as binding authorities. There is clearly no disagreement expressed nor was it necessary.

On the other hand, I find Muthuswami Aiyar, J., distinctly states that the right to order further enquiry is necessary in order that the Sub-Magistrate might reconsider his view with reference to "considerations overlooked by the Subordinate Magistrate and "indicated by the revising tribunal," and Mr. Justice Shephard expresses his concurrence with Mr. Justice Wilson as to the meaning of the term 'enquiry' which led to the conclusion that the class of cases where there is only misappreciation of evidence must be referred to the High Court. The Chief Justice and Parker, J., simply expressed their concurrence. It appears to me, therefore, to be perfectly clear that the case of *Queen-Empress* v. *Balasinnatambi*,(1) cannot be treated as having finally decided the question. It also appears very doubtful whether the judgment of Muthuswami Aiyar, J., can now be supported if it differs from the judgment of the Calcutta High Court.

Muthuswami Aiyar, J., was of opinion that as an incorrect finding is specified by section 435 as one of the matters to be examined on revision by the High Court as well as the other Courts, and as section 436 contemplates a reconsideration of the evidence already recorded as the basis of a commitment and the power to order further enquiry is conferred upon the District Magistrate and Sessions Judge in common with the High Court whose powers are declared by section 439, it must be taken that the other Courts mentioned in section 437 have also got the powers of the High Court. If I have rightly understood the judgment, I may say the entire basis of this reasoning fails under

(1) (1891) I.L.R., 14 Mad., 334.

Act V of 1898, the present Criminal Procedure Code, because section 437 only empowers an order for *enquiry* which by the *new* definition excludes a *trial*, which of course may be ordered by the High Court. Mr. Justice Shephard did not take this view. But as, on either view, an order for reconsideration of the evidence cannot be supported, I do not think it necessary to consider how far this reasoning vitiates the soundness of the conclusion.

My third reason is that the conclusion which I have arrived at is in accordance with principle. No doubt, in cases coming before Courts for revision, the High Court as well as the District Magistrate is entitled to consider the whole evidence. But a mere difference in opinion has never been held to justify interference in revision. The fact that the High Court or the District Magistrate might be disposed to take the view that the prosecution evidence has been discredited for insufficient reasons has alone not been considered sufficient.

The boundary line between an appeal and a revision may be indistinct in many cases. But it is clear that there is a wide difference in principle. Where there is no evidence, or the evidence is of such a character that no Judge could possibly come to such a conclusion, which as Lord Halsbury pointed out stands on the same footing, or where the findings of fact do not support the order, or where there is any exclusion of evidence or defective investigation, or where important evidence has not been considered, or the Magistrate has considered the evidence from a wrong point of view, the order may be set aside on revision; where the evidence is mainly documentary and the Court is therefore in the same position to weigh evidence as the lower Court, the Court may consider its effect. But a mere difference of opinion as to the weight to be attached to the evidence and in particular to oral testimony as in the case before us, has never been held to be a sufficient reason for interference in revision so far as I know by any High Court in India. I shall refer only to a few Madras cases.

The Full Court in 5 M.H.C. Reps., App. X, and a Division Bench in *In the matter of Aurokiam*(1), held they were precluded from interfering with a judgment of acquittal though in their opinion the acquittal was not right. For the same reason even

(1) (1878-1881) I.L.R., 2 Mad., 38.

in a case of conviction the High Court refused to examine the evidence in *Queen-Empress* v. *Lakshmi Nayakan*(1). It so held also in a case of an order for commitment under section 436, *Muthiah Chetty* v. *Emperor*(2).

It is not only in cases of conviction of acquittal that this rule is followed but also in cases of discharge. The decisions in *Chinnasawmy Naidu* v. *Veeriah Naidu*(3) (C.J. and Davies, J.) and *Queen-Empress* v. *Erram Reddi*(4), are two Madras cases in point. It may be strongly doubted whether the District Magistrate had even under the old code got the same power in revision under section 437 as the High Court had under sections 439 and 423. But it is clear that it was not higher. If so, how is it open to a District Magistrate to set aside as in this case an order of discharge on the ground of wrong appreciation of evidence when it is not open to the High Court to do so. I have already pointed out that it is clear that his power is not concurrent under the present Code. If we are to recognize the distinction which, in my opinion, exists between revision and appeal, it appears to me necessarily to follow that on account of mere misappreciation of evidence neither the High Court nor a District Magistrate can interfere with an order of discharge.

The reason of the thing also appears to me to be in favour of such a conclusion. I have already pointed out that it is unreasonable that if a District Magistrate has come to the conclusion that a *primâ facie* case has been made out it should not be decided once for all whether the accused should not be at once placed upon his trial without another preliminary investigation. In my opinion the District Magistrate or the Sessions Judge ought himself to undertake the responsibility of ordering or recommending the framing of a charge and subsequent trial and should not be allowed practically to shirk it by passing it on to an inferior Magistrate in the form of an order for a preliminary enquiry. The result will be that, if the case is sent before a different Magistrate as in the case before us and in *Lakshminarasappa* v. *Mekala Venkatappa*(5), all the evidence that has been already taken may and will probably be discarded by the new Magistrate

(1) (1896) I.L.R., 19 Mad., 288. (2) (1907) I.L.R., 30 Mad., 224.
(3) Weir's Criminal Rulings, Vol. II, 257.
(4) (1885)I.L.R., 8 Mad., 299. (5) (1908) I.L.R., 31 Mad., 133.

and all the prosecution witnesses be examined again. The conclusion based on such evidence cannot be equally satisfactory and the accused will be placed at a great disadvantage which would be avoided by a reference to the High Court. Moreover it is quite clear to me that section 437 does not contemplate that evidence already recorded should be taken again. It is eminently desirable that the Court should be able to decide the case upon the evidence recorded at the earliest opportunity.

Further, if an opinion is expressed by the District Magistrate, it is pretty certain that the accused will be in remand and not be allowed on bail. Such detention seems to me an unnecessary interference with his liberty, when he should be detained only for the purpose of his trial.

I cannot put the result of the opposite conclusion more forcibly than it has been put by Bayley, J. "An accused might, if this "were permitted, be harassed beyond all measure. The Magis- "trate of a district, if not satisfied with the order of discharge "passed by one subordinate Magistrate, might refer the case for "fresh enquiry to every one of his subordinates in succession; "and if each enquiry resulted in the discharge of the accused, the "District Magistrate might as a last resource proceed to try the "case himself." The same observations of course apply to a Sessions Judge also. In the case before us I presume it would be open to the new Magistrate to admit or reject the so-called confession held by the District Magistrate to be inadmissible and if the Sessions Judge after another discharge is of a contrary opinion, he might again order a retrial. All these difficulties may be avoided by a reference to the High Court under section 438.

For these reasons I am unable to agree with Munro and Pinhey, JJ. and I adhere to the opinion already expressed in *Lakshminarasappa* v. *Mekala Venkatappa*(1). Briefly, my reasons are:—I think they have failed to consider the fact that it is only an *enquiry* and not a *trial* that can be ordered under section 437: and hence to differentiate between the cases which call for enquiry and which require an order for trial; they have also not taken section 438 into consideration in construing sections 435 and 437 and not considered whether the calling up of the records to decide

(1) (1908) I.L.R., 31 Mad., 133.

whether the finding is incorrect may not be due in certain cases for the purpose of revision under section 437 and in other cases for reference under section 438 and whether a distinction does not exist in principle between the two classes of cases already mentioned by me, in one of which the Magistrate or Judge is to act under section 437 in the other under section 438. They have also failed to note that the revisionary power of the lower Courts is less and certainly not higher than that of the High Court and to be exercised therefore only in those cases where the High Court, if the case had originally come before it, would have exercised it.

As my learned colleague Munro, J., differs from me and the pleaders as well as ourselves consider that the matter is one for consideration by a Full Bench, the case will be placed before the Chief Justice for orders to be heard by a Full Bench. The questions that I would refer to a Full Bench are:

(1) Whether it is open to a District Magistrate or Sessions Judge to set aside an order of discharge for reasons other than those which justify a High Court to interfere in revision.

In my opinion it is not open to him to do so.

(2) Whether in a case where the District Magistrate or the Sessions Judge considers that a Magistrate is wrong in discharging an accused and a *primâ facie* case is made out against the accused he is entitled to frame the charge or order the Magistrate to frame the charge and try him.

I am of opinion that even under the old code he had no such right and under the new code, for reasons already stated, he cannot do so.

(3) Whether in such a case of difference of opinion due to mere appreciation of evidence, the District Magistrate or Sessions Judge ought not to refer the case to the High Court for orders under section 438 or whether he would be justified in ordering a reconsideration of the same evidence on account of this difference of opinion.

The order that the enquiry should be held by another Magistrate is undoubtedly opposed to the rulings of this Court. Whether the Magistrate to whom the case is transferred can decide it wholly or in part upon the evidence already taken (section 350, Criminal Procedure Code) is a question on which there is a conflict of opinion. But there can be little doubt that

ordinarily he will re-examine the witnesses. In the case of *Queen-Empress* v. *Amir Khan*(1) the Judges say "while we are not "prepared to say that in no case is it competent to him to do so "when he acts under section 437, we consider that it was intended "that the further inquiry should ordinarily be held by the "Magistrate who made the original enquiry inasmuch as the "section does not contemplate that the evidence taken should "be retaken", and in another case (*Queen-Empress* v. *Erram Reddi*(2) Mr. Justice Brandt says "in case of the death or removal "of such Magistrate, or for other similar cause, it may be that "further enquiry might be conducted by another Magistrate but "that the rule is as above stated."

The judgment of Muthuswami Aiyar, J., shows that he had in view only the consideration of the evidence already recorded which precludes a transfer to a different Magistrate. It appears to me this order therefore cannot be supported. The necessity of a transfer if the order of discharge is to be set aside is a further argument against the opposite conclusion as to the right of remand for further consideration.

MUNRO, J.—I adhere to the opinion expressed in *Venkata Subba Reddi* v. *Ayyalu Reddi*(3). I agree to the proposed reference to a Full Bench.

The case again came on for hearing in due course before the Full Bench constituted as above, the Public Prosecutor opposed the application, when the Court expressed the following opinion:—

JUDGMENT (WALLIS, J.).—General revisional jurisdiction is conferred by sections 435, 438 and 439 of the Code of Criminal Procedure. Under these sections the Sessions Judge and the District Magistrate cannot themselves interfere except to suspend the execution of a sentence or grant bail but can only report to the High Court, and the High Court may in its discretion exercise any of the powers referred to in section 439 (1). As regards dismissals of complaints under sections 203 and 204 (3) and orders of discharge there is no appeal as there is in cases of acquittal and conviction and the legislature has not thought it sufficient to leave these orders to be dealt with under the general revisional jurisdiction already mentioned, and has conferred special powers

(1) (1885) I.L.R., 8 Mad., 341. (2) (1885) I.L.R., 8 Mad., 299.
(3) (1909) I.L.R., 32 Mad., 214.

in regard to these orders on the High Court itself as well as on the Sessions Judge and District Magistrate. Section 437 empowers the High Court or the Sessions Judge or the District Magistrate to order further inquiry and the District Magistrate himself to make further inquiry into a complaint which has been dismissed and into the case of an accused person who has been discharged and the effect of the order for further inquiry is of course to set aside the dismissal of the complaint and the order of discharge.

"Inquiry" is now defined in section 4 (*k*) as including "every inquiry other than a trial conducted under this Code by a Magistrate or Court." Trial begins when the accused is charged and called on to answer and then the question before the Court is whether the accused is to be acquitted or convicted and not whether the complaint is to be dismissed or the accused discharged. These, as observed by Wilson, J., in *Hari Dass Sanyal* v. *Saritulla*(1) are questions which arise at the stage of inquiry. Therefore an order for further inquiry directed to a Subordinate Court means that the case should be taken up again and that the question of dismissing the complaint or charging the accused, as the case may be, should be again considered and an appropriate order made as a result of such fresh consideration. It follows that a Sessions Judge or District Magistrate who considers that the accused has been improperly discharged cannot himself commit the accused for trial at Sessions under section 437 as that would be an order to be made in the course of the further inquiry, and could only be made by the person making the further inquiry. Section 436, however, authorizes the Sessions Judge or District Magistrate when he considers that the case is exclusively triable by the Court of Session and that the accused has been improperly discharged by the inferior Court instead of ordering a fresh inquiry—which words, it is well settled, mean a "further inquiry" under section 437—himself to order the accused to be committed for trial before the Sessions Court upon the matter of which he has been improperly discharged. Thus in the gravest class of cases the Sessions Judge and District Magistrate are empowered to dispense with further inquiry and commit for trial forthwith, thus avoiding the stage of further proceedings before the Subordinate Magistrate

(1) (1888) I.L.R., 15 Calc., 608.

which the legislature considers unnecessary in view of the weight attached to the opinion arrived at by the Sessions Judge or District Magistrate. It might possibly have been more logical if the legislature had enabled the Sessions Judge and District Magistrate when they consider the accused has been improperly discharged to dispense with further inquiry and make an order for trial also in the less serious cases which are not triable before a Court of Sessions, but the reasons for dispensing with further inquiry are undoubtedly less strong, as the order for further inquiry sends the case back to a Magistrate who can take it up and dispose of it finally, whereas in a Sessions Case the order for further inquiry involves further proceedings before the Magistrate followed in case of committal by trial before the Sessions Court. However this may be, section 436, in my opinion, has a most material bearing on the question raised in the present reference, because I think it is opposed to the view put forward by the majority of the Full Bench in *Hari Dass Sanyal* v. *Saritulla*(1), that when the Sessions Judge or District Magistrate disagrees with the conclusion of the Subordinate Magistrate on a consideration of the evidence and comes to the conclusion that he has been improperly discharged, the proper course in cases not triable at Sessions and so not coming under section 436 is not to order further inquiry under section 437, but to take action under the general revisional sections and report the case to the High Court, so that it may pass an order for trial under section 439. When the legislature is not satisfied that the general revisional jurisdiction established by it is sufficient to deal with a particular class of cases and creates a special revisional jurisdiction in such cases, it seems to me to be in accordance with the intention of the legislature that the special jurisdiction should be exhausted before the general jurisdiction is resorted to. If the legislature had considered that reporting to the High Court with a view to an order being made under section 439 was a suitable and convenient course, it would not have enacted section 436 which enables the Sessions Judge or District Magistrate to commit for trial direct in the most serious class of cases. This section enables the Sessions Judge or District Magistrate to order a committal "instead of directing a fresh inquiry." It does not say "instead

(1) (1888) I.L.R., 15 Calc., 608.

of reporting the case to the High Court" as it should, in my opinion, have said if the view put forward in the Calcutta case is correct. On the contrary it appears to assume that but for the special power conferred by section 436 the natural and proper order would be an order for further inquiry under section 437 and even leaves it open to make such an order in cases coming under section 436, as the word used is 'may' and not 'shall'. If this view be correct, it follows that in the less serious class of cases not triable at Sessions and so not coming within section 436, it is equally open to the Sessions Judge or Magistrate to order further inquiry under section 437, where in his opinion the accused has been improperly discharged. It was pointed out by Muthusami Aiyar, J., in *Queen-Empress* v. *Balasinnatambi*(1), that the object of investing the Sessions Judge and the District Magistrate with the powers conferred upon them by sections 436 and 437 was to obviate the expense and inconvenience which the necessity to resort to the High Court (under sections 438 and 439) might in such cases entail, and we should, in my opinion, be defeating the object of the legislature if we were to refuse to allow the Sessions Judge and District Magistrate to exercise the power conferred on them by section 437 and to compel them to act under sections 438 and 439. I am not called on to discuss the expediency of these provisions but I may observe that, if a Sessions Judge or District Magistrate can be trusted to commit for trial in more serious cases under section 436, he can equally be trusted to make an order for further inquiry under section 437 in less serious cases, and that I am not at all satisfied that such an order is likely to be useless or ineffective even where it is based only on the fact that the Sessions Judge or District Magistrate merely differs from the conclusion arrived at by the Subordinate Magistrate in the first instance upon the evidence on record. If the legislature had been of that opinion they would, I cannot help thinking, have enabled the Sessions Judge or District Magistrate himself to make an order for trial in the less serious class of cases not coming under section 436 as well as in the more serious class of cases coming under that section. With very great respect I am unable to agree with the opinion expresed by Mr. Justice Wilson in *Hari Dass Sanyal* v. *Saritulla*(2) in cases where, in the opinion of the

(1) (1891) I.L.R., 14 Mad., 334 at p. 338. (2) (1888) I.L.R., 15 Calc., 608.

District Judge, there is a clear case on the evidence already recorded for charging and trying the accused, viz., that the case should be reported to the High Court under section 438 for an order under section 439, and not dealt with under section 437. In the latter case which came before the Full Bench of this Court, *Queen-Empress* v. *Balasinnatambi*(1), the Sessions Judge had come to the conclusion that there was a clear case for charging and trying the accused, yet it was held that an order for further inquiry was a proper order, although no further evidence was forthcoming. I agree with Mr. Justice Pinhey in *Venkata Subba Reddi* v. *Ayyalu Reddi*(2) that the Full Bench deliberately refused to follow the portion of Mr. Justice Wilson's judgment above referred to.

In his order of reference Mr. Justice Sankaran-Nair observes that in so far as it holds that a trial as now understood can be ordered under section 437 this judgment is no longer law. But I cannot see that any such proposition is laid down in that case. All the Judges say is that further inquiry may be ordered. It is true they answer in the affirmative the question "whether it is competent to direct further inquiry or retrial to be held where additional evidence is not forthcoming." The word "retrial" here is not perhaps very appropriate, as *ex hypothesi* no trial has yet been held, but it cannot, in my opinion, mean trial without further inquiry such as may be ordered under section 436. Both the judgments show that the learned Judges were fully alive to the difference between sections 436 and 437.

Mr. Justice Sankaran-Nair, if I understand his order of reference rightly, is also of opinion that restrictions should be imposed on the exercise by a Sessions Judge or District Magistrate of the powers conferred on him under section 437 based on a consideration of the restrictions which the High Court imposes on itself in the exercise of its revisional jurisdiction under section 439, and has expressed the opinion that neither the High Court nor a Sessions Judge, nor a District Magistrate can interfere with an order of discharge on account of mere misappreciation of evidence. With great respect I am unable to agree with his view which appears to me to be opposed to *Hari Dass Sanyal* v.

(1) (1891) I.L.R., 14 Mad., 334 at p. 338. (2) (1909) I.L.R., 32 Mad., 214.

Saritulla(1) as well as to *Queen-Empress* v. *Balasinnatambi*(2). As I have already pointed out the legislature has considered it necessary to confer a special jurisdiction on the High Court as well as on the Sessions Judge and District Magistrate in cases of dismissals of complaints and orders of discharge as to which there is no right of appeal. From this I gather that it was the intention of the legislature that the High Court should have a freer hand in interfering under section 437 than under section 439, and the powers of the High Court and the Sessions Judge and District Magistrate are co-extensive under section 437. There is nothing in section 437 to suggest that misappreciation of evidence in the lower Court is not a ground of interference, and section 436 which enables an order of committal to be made when the Sessions Judge or District Magistrate considers that the accused has been improperly discharged shows, in my opinion, that misappreciation of evidence is a ground of interference under these sections. I would therefore answer the first question which refers to this point by saying that the powers of interference of the High Court and the Sessions Judge or District Magistrate are co-extensive under section 437 and are not limited as suggested in the order of reference.

As regards the second question, I am of opinion that the Sessions Judge or District Magistrate cannot in the exercise of the power to order further enquiry under section 437 himself frame the charge or order the Magistrate to frame the charge or try the accused. Under the other part of the section the District Magistrate might of course make the further enquiry himself and frame the charge in the course of it. As regards the third question I am of opinion that the Sessions Judge or District Magistrate is not bound to refer the case to the High Court in a case of difference of opinion owing to mere appreciation of evidence, but would be justified in ordering a re-consideration of the same evidence.

As regards the last point which is not the subject of a formal question I desire to say that in my opinion the unsatisfactory manner in which a case had been dealt with by a Subordinate Magistrate would be good ground for ordering further enquiry by another Magistrate. And with regard to the

(1) (1888) I.L.R., 15 Calc., 608. (2) (1891) I.L.R., 14 Mad., 334.

remark of the learned Judges who decided *Queen-Empress* v. *Amir Khan*(1)—the decision overruled by the Full Bench in *Queen-Empress* v. *Balasinnatambi*(2)—that section 437 does not contemplate that the evidence taken should be retaken, I would point out that section 437 does undoubtedly contemplate that further enquiry may be made by another Magistrate; and if it is necessary and incidental to the further enquiry being made by another Magistrate that the evidence taken before the first Magistrate should be retaken, the legislature must be considered to have contemplated this also. In the present case, we do not consider there is any case for interference and dismiss the petition.

MUNRO, J.—I would answer the questions referred to us in the same way.

SANKARAN-NAIR, J.—For the reasons already recorded, I agree with the judgment of Wilson, J., concurred in by the majority of the Full Bench of the Calcutta High Court on the question raised before us.

In my order of reference I have pointed out that though section 437 empowers the District Magistrate or Sessions Judge to order a futher enquiry, his order may be and in fact ought to be set aside by the High Court in revision if on the facts found the case is not one in which an order for enquiry is the appropriate order. I do not understand my learned colleagues to deny this proposition.

I then pointed out that where a District Magistrate or Sessions Judge differs from the Subordinate Magistrate in his conclusion and is of opinion that a case is made out which requires an answer from the accused, no useful purpose is served by an enquiry; the question then is whether there should be a retrial: and a further enquiry in these circumstances would be unfair to the accused.

To this, so far as I can see, there has been practically no reply. Why there should be an enquiry again, particularly when the matter can be otherwise settled, is not suggested. It is not denied that the real question at that stage for consideration is whether there should be a trial; and it would be more logical for the legislature to enable the District Magistrate and Sessions Judge to make an order for trial. I think the legislature has carried out this purpose by enabling the District Magistrate

(1) (1885) I.L.R., 8 Mad., 336. (2) (1891) I.L.R., 14 Mad., 334.

or Sessions Judge to carry out the enquiry himself, in which case he might frame the charge and try the accused or refer the matter to the High Court for decision under section 438. That in the case before us, as in the majority of orders probably under section 437, the order is unjust to the accused can, in my opinion, be scarcely denied. If the new Magistrate forms his opinion on the evidence already taken, it cannot be as valuable as that of his predecessor who had the advantage of examining the witnesses. If the Magistrate re-examines the prosecution witnesses, or examines new witnesses, it obviously gives an unfair advantage to the prosecution which, I feel confident, the law never contemplated.

An additional disadvantage has been brought to my notice in the course of the argument in a case heard after this. If the new Magistrate is entitled to try the accused summarily, it may be, that the accused will lose the benefit of an enquiry and trial, where evidence is taken in the usual course, and the right of appeal in case of conviction.

It appears to me that when a power is conferred in general terms and under certain circumstances the power should be exercised in a particular way, in the interests of justice, then it is only consistent with principle to hold that the power should be so exercised.

The difference between the powers of a Court of Appeal and a Court of Revision is also in support of the petitioner. That in a certain class of cases, section 436 indicates this to be the appropriate course also favours his contention.

With reference to the argument based on the occurrence of the words "instead of directing a fresh enquiry" and the omission of "instead of reporting to the High Court for committal" in section 436, it must be remembered that section 436 does not refer to section 437; that when the former section was drafted, it was not settled by decisions that the words were used in the same sense as the corresponding words in section 437, that on this point Judges have differed and that even in the cases referred to in section 436 the power conferred by section 438 may be even now exercised when the circumstances warrant it; and in my opinion it would be properly so exercised when there is an important question of law to be decided. Nor am I able to accept the suggestion that section 437 confers higher powers than section

439. What was held by Muthusami Ayyar, J., in his judgment was that for the reasons given by him, which I have set out in my order of reference, the District Magistrate and the Sessions Judge acting under section 437 had the powers of the High Court acting in revision under section 439 and therefore the power to order further enquiry, *i.e.*, for a reconsideration of the evidence. This it appears to me is clearly wrong under the present code, as the High Court may order a retrial under sections 423 and 439 which the District Magistrate and Sessions Judge have no power to do under section 437. There is thus nothing in that decision to support the contention now put forward—it is in fact opposed to it—that the powers conferred by section 437 are wider than the powers conferred by sections 439 and 423. And I have already given my reasons for holding that the High Court in revision do not interfere on a mere difference of opinion as to the weight due to the oral evidence in a case. There is of course no doubt that the Courts therein referred to have concurrent powers under section 437. The only question is whether they are more than the powers conferred on the High Court by section 439.

The argument from the expense and inconvenience also tells strongly in favour of the accused. When the case is referred to the High Court under section 438, the inconvenience to the prosecution—in this case the Superintendent of Police—is nothing, the expense, if any, is trifling. To the accused, if an ordinary ryot, a further enquiry is certainly harassing. It might prove his ruin even if he is finally acquitted. And it is quite possible that there might be further orders for "further enquiry" till he is finally convicted. For these reasons, I would set aside the order directing further enquiry.

APPELLATE CIVIL.

Before Mr. Justice Miller, Mr. Justice Sankaran-Nair and Mr. Abdur Rahim.

1908. September 15. October 23. December 18. 1909. January 12.

THATHU NAICK AND OTHERS (PLAINTIFFS NOS. 2 TO 4 AND SECOND PLAINTIFF'S LEGAL REPRESENTATIVES), APPELLANTS,

v.

KONDU REDDI AND OTHERS (DEFENDANTS AND LEGAL REPRESENTATIVES OF THE FIRST DEFENDANT), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, ss. 244, 294—Confirmation of sale no bar to set aside sale in contravention of s. 294—Plaint or written statement in Court executing decree may be treated as application under s. 244—Burden of proof in suit to set aside sale.

The holder of a mortgage decree brought the mortgaged property to sale in execution. He applied to the Court for permission to bid at the sale, and the Court granted him permission, fixing an amount as the minimum at which he was to bid. The decree-holder purchased the property at sale by Court in the name of a third party for a sum far less than the minimum fixed by the Court and less than the principal amount secured by the mortgage. The sale was confirmed and possession delivered to the purchaser, but actual possession remained with certain parties who had purchased the property from the original mortgagor.

In a suit brought by the decree-holder and auction-purchaser, as plaintiffs in the Court which executed the decree, against the original mortgagor, and the purchasers from them as defendants, the defendants who discovered the fraud of plaintiffs subsequent to the confirmation of sale, contended that the sale to plaintiffs was fraudulent and contrary to the provisions of section 294 of the Code of Civil Procedure:

Held (1) that the confirmation of the sale was no bar to enforcing the right of defendants to set aside the sale, the fraud having been discovered only after such confirmation.

Held, also *per* MILLER and SANKARAN-NAIR, JJ. (ABDUR RAHIM, J., dissenting) that it was open to the defendants to have the sale set aside in the suit by way of answer to the plaintiff's claim.

Per ABDUR RAHIM, J.—The sale cannot be set aside except on an application by defendants under sections 294 and 244, Civil Procedure Code, to the Court executing the decree.

Per SANKARAN-NAIR, J.—A plaint in a suit, in the Court executing the decree may be treated as an application under section 244 of the Code of Civil

* Second Appeal No. 847 of 1905.

Procedure. So also a written statement, containing an answer to the plaintiff's claim may be treated as an application under section 244.

Where a decree-holder purchases property in contravention of section 294, the judgment-debtor, seeking to set aside the sale, need not prove or allege fraud or that the property was sold at an undervalue. In such a case, and especially where the purchase money is less than the amount advanced on the land, it is for the decree-holder to show that the sale should be upheld.

Per MILLER and ABDUR RAHIM, JJ.—The bare fact that the sale was in contravention of section 294 is not sufficient to set aside the sale as fraudulent. It must be shown that loss resulted to some one in consequence.

Mahomed Gasee Chowdhry v. *Ram Loll Sen*, [(1884) I.L.R., 10 Calc., 757], followed.

Bhiram Ali Shaik Shikdar v. *Gopi Kanth Shaba*, [(1897) I.L.R., 24 Calc., 355], followed.

SECOND APPEAL against the decree of W. W. Phillips, District Judge of Tinnevelly, in Appeal Suit No. 274 of 1904, presented against the decree of T. Krishnaswami Naidu, District Munsif of Satur, in Original Suit No. 152 of 1903.

The facts of the case are fully stated in the judgments of Miller and Abdur Rahim, JJ.

S. Srinivasa Ayyangar for the Hon. Mr. *V. Krishnaswami Ayyar* for second and fourth appellants.

K. N. Aiya for fourth and fifth respondents.

JUDGMENTS (MILLER, J.).—The first plaintiff sues for the recovery of property purchased by him at a Court-sale in execution of a mortgage decree obtained by himself. The principal money due being Rs. 750 he obtained permission to bid at the sale to an amount not less than Rs. 1,500. The sale was held but neither he nor any one else made any bid: a month or two later another sale was held but again the property was not sold: at the third sale without asking for permission to bid he purchased in the name of the second plaintiff for a sum considerably less than the principal money due on the mortgage. The sale was confirmed and possession delivered to the second plaintiff under section 319, Civil Procedure Code. The plaint alleges that delivery was under section 318, and the delivery order and receipt are not on the record, but I take it for the purposes of this judgment, paragraph 12 of the plaint being ambiguous, that the fourth and fifth defendants are purchasers from the judgment-debtors pending the plaintiff's suit on his mortgage and have retained actual possession of the land ever since their purchase. The first plaintiff now sues to recover the land from them, and they resist him on several

grounds of which one only has been dealt with by the Courts below. They have dismissed the suit, holding that the sale to the first plaintiff is void by reason of his having fraudulently purchased the property through the second plaintiff for a smaller sum than he must have paid had he, acting on the permission given him by the Court, bid at the auction in his own name or openly by an agent.

I must assume that the fourth and fifth defendants did not know the truth before the institution of the present suit, and that the Court executing the decree was equally in the dark.

These being the facts I may clear the ground by stating that I do not think the fact that the sale has been confirmed affects the case. At the time of confirmation neither the judgment-debtors nor the Court had notice of any fact which would have caused the latter to refuse confirmation, and their ignorance was due to deceit practised by the decree-holder-purchaser.

The purchase being effected in contravention of the provisions of section 294, the sale is voidable, in the discretion of the Court, on the application of any person interested in it, and I have no doubt that the fourth and fifth defendants, who are, *ex-hypothesi*, bound by the decree, are persons interested in the sale.

The appellants contend that under section 294 the execution Court alone can exercise the powers conferred by the section and as the sale has not been set aside by that Court the respondents have no defence. It is also contended that section 244 of the Code bars the defence; and that the decision on the ground of fraud is bad in the absence of an allegation of fraud in the written statement of the fourth and fifth defendants.

The second contention is, I think, unsound. *Bhiram Ali Shaik Shikdar* v. *Gopikanth Shaha*(1) and *Venkataramachariar* v. *Meenatchisundram Ayyar*(2) in this Court are authorities to the contrary, and I am unable to accept the view pressed upon us in the able argument addressed to us on behalf of the appellants, that the words, "by a separate suit" in section 244 are equivalent to "in a separate suit whether the question is raised by the plaintiff or the defendant." I prefer the view taken by the Calcutta High Court that the section "bars a suit brought for the determination of certain questions, but does not bar the trial of an issue involved in those questions, if the issue is raised at the

(1) (1897) I.L.R., 24 Calc., 355 at p. 357.
(2) S.A. No. 616 of 1903 (unreported).

instance of a defendant in a suit brought against him." As was pointed out in *Venkataramachariar* v. *Meenatchisundram Ayyar*(1) this view tends to prevent multiplicity of proceedings, and it also avoids the necessity of compelling a defendant to raise in the execution Court questions which it may be entirely unnecessary to agitate so long as he is left in peaceable possession of his property. In the present case it is obviously more convenient to try the question in the present suit, than to stay proceedings and refer the fourth and fifth defendants to an application to the execution Court, the execution of the decree having been, so far as they are concerned, closed long ago with the delivery of possession to the second plaintiff.

The first contention amounts to this: though the execution Court could, if it thought fit, set aside the sale, the Court trying this suit cannot do so, and cannot therefore refuse to enforce it. In *Mahomed Gazee Chowdhry* v. *Ram Loll Sen*(2), the Court did refuse to enforce a sale in similar circumstances, but it is argued that decision ought not to be followed.

It seems to me, however, that that decision is right: assuming fraud on the part of the first plaintiff what he in effect asks the Court to do is to aid him in bringing his fraud to a successful issue. By deceiving the execution Court and the judgment-debtors he has obtained for himself an advantage over the latter which he would not have obtained had the Court known the truth: and because he has been able ever since to keep the truth from the knowledge of the judgment-debtors and the fourth and fifth defendants, the Court must, he claims, give him a decree now. I cannot believe that it is the duty of the Court knowingly to accept the position of an instrument of fraud, and that too when the fraud has been practised upon itself or upon another Court which is practically the same thing. We might no doubt stay proceedings and give the judgment-debtor an opportunity of applying to the execution Court, but that would be, I think, an unnecessarily circuitous method of procedure.

But it has to be remembered that fraud means more than mere trickery. The first plaintiff has deceived the execution Court: knowing that that Court would not give him permission to buy the land for Rs. 436, he has set up the second plaintiff to buy it for

(1) S.A. No. 616 of 1903 (unreported). (2) (1884) I.L.R., 10 Calc., 757.

him: he has thus by his deceit obtained an advantage for himself, but at whose expense? If he has paid its full value for the land no one is the loser by his trick and the sale will be maintained (*Mathura Das* v. *Nathuni Lall Mahta*(1).) It matters not to the judgment-debtors who buy the land provided it fetches its full value at the sale.

This brings me to the third contention that no fraud was alleged or proved. In the written statement of the fourth and fifth defendants, and in the additional written statement of the fourth defendant all that is said is that the sale is invalid because the first plaintiff was the real purchaser through the second plaintiff, and had no permission to bid. It is nowhere alleged that the price realised was insufficient.

Nevertheless the District Munsif taking into consideration the fact that the purchase price was less than the amount lent on mortgage on the land has held that the first plaintiff has defrauded the judgment-debtors by purchasing at an under value *benami*. No other injury to the judgment-debtors is suggested. The eighth issue, the only one decided, does not raise this question, but having regard to the undoubted facts, the fact that the fourth and fifth defendants are not the actual debtors (though it may be that they are bound by the decree) and may possibly not have been aware of the amount realized at the sale, the fact that the first plaintiff must have known that except by a trick he could not have obtained leave to bid for so little as Rs. 436, and the fact that that sum is but little more than half the principal mortgage money—having regard to all these facts I have come to the conclusion that we ought to allow the issue to be tried now.

I would frame it thus and ask the lower Appellate Court to return a finding on it:—"Has the first plaintiff by deceiving the Court and the judgment-debtors become the purchaser of the land in question, for less than its true value at the date of the sale?" If he has, it seems to me, he has been guilty of a fraud upon the Court and the judgment-debtors and the Court will not lend him its assistance.

As my learned brother differs, and neither of us is prepared to dismiss the appeal, we will lay the case before the learned Chief Justice for reference to a third Judge.

(1) (1885) I.L.R., 11 Calc., 731.

ABDUR RAHIM, J.—The first plaintiff in the suit in which this second appeal has arisen bought at a Court auction sale held on the 8th March 1901 the property which he now seeks to recover from the defendants, in the name of the second plaintiff but for his own benefit. The sale which was effected in execution of a mortgage decree for Rs. 1,632-7-0 obtained by the first plaintiff in Original Suit No. 368 of 1899 on the file of the District Munsif's Court of Satur against the defendants Nos. 1 and 2 was confirmed on the 12th April 1901 and the second plaintiff the apparent purchaser also obtained symbolical delivery of possession but did not succeed in obtaining actual possession of the property. Before the sale of the 8th March 1901, there had been two infructuous attempts at sale one on the 12th October 1900 and the other on the 18th January 1901, on both of which occasions there was no bidder. At the third sale the second plaintiff was the only bidder and the property was knocked down to him for Rs. 436. On the 1st September 1900, that is, before the first infructuous sale the first plaintiff had applied under section 294, Civil Procedure Code, for leave to bid and obtained it on condition that he was to commence his bids at Rs. 1,500, namely, twice the principal amount secured by his mortgage. So far as it appears this limit was fixed without any reference to the value of the property. The defendants Nos. 4 and 5 bought the property from the defendants Nos. 1 and 2 during the pendency of the mortgage suit, Original Suit No. 368 of 1899 and are therefore bound by the decree in that suit and would have the same right to impeach the sale as defendants Nos. 1 and 2.

Both the lower Courts dismissed the plaintiff's suit holding on the authority of *Mahomed Gazee Chowdhry* v. *Ram Loll Sen*(1) that the plaintiff purchased the property by means of fraud practised on the Court and therefore his purchase was void and of no effect in law. The learned pleader for the plaintiffs who are the appellants in this Court argues that in the first place the lower Courts were not entitled to find a case of fraud as no fraud was at all alleged in the written statements, nor was any issue framed raising the question. There can be no doubt it seems to me that the rule is well established that a party relying upon fraud either as the basis of his action or as defence to a suit must plead it in distinct

(1) (1884) I.L.R., 10 Calc., 757.

terms so that the party whose act is impeached as fraudulent may have full notice of the charge he has to meet. This proposition is emphatically enunciated in *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalan*(1), where their Lordships of the Privy Council strongly protest against the propriety of the Appellate Court entertaining a case of fraud other than the one specifically alleged in the pleadings. Here though the question of fraud is discussed in the judgment of the Munsif it does not appear that the plaintiffs were invited to go to trial on that question and in their grounds of appeal to the Lower Appellate Court they protested against the Munsif considering any case of fraud. But it is said that the facts which are found in this case to constitute fraud are all admitted and as fraud has been inferred from those facts merely as a conclusion of law the plaintiffs can have nothing to complain of. But I am not sure that this is so. In my opinion the admitted facts of this case such as they are did not preclude the necessity of pleading fraud in express terms, because the first plaintiff might for instance be able to show if a proper opportunity were given to him that the judgment-debtors agreed to his bidding for the property in the name of the second plaintiff for Rs. 436 or that the judgment-debtors subsequently to the sale and with full knowledge of the facts ratified or acquiesced in the purchase made by the first plaintiff. All that was, in fact, pleaded was that the purchase was made without permission of the Court and therefore could not be enforced.

Now do the facts which I have stated make out that there was fraud vitiating the sale? The fact that the first plaintiff bought the property through the second plaintiff does not in itself constitute fraud even although he did so without disclosing it to the Court holding the sale and with the object of evading the necessity of obtaining the Court's leave under section 294, Civil Procedure Code. What he did no doubt amounted to a violation of the statutory rule as enacted in section 294, Civil Procedure Code, and that section itself lays down the penalty for his so buying the property, namely, that the Court may, if it so chooses, set aside the sale on an application being made to that effect by the judgment-debtor. The restriction imposed on a decree-holder buying the property of the judgment-debtor in execution of his decree

(1) (1900) I.L.R., 23 Mad., 227 at p. 237.

is the creation of a statute and when we find that the same statute has provided a penalty for the violation of such restriction I think it is according to a sound canon of construction that the penalty should be regarded as co-extensive with the disobedience of the restriction. What I mean is that the Court cannot attach to the disregard of a rule like this consequences other than that contemplated by the legislature by converting such a disregard into fraud. In *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalan*(1), the Judicial Committee of the Privy Council point out that in this country where the responsibility for conducting the sale devolves entirely on the Court the necessity for obtaining its permission to bid cannot be said to impose the same obligations on the decree-holder wanting to buy the property as in England where the decree-holder, has generally the conduct of the sale. The cases referred to, namely, *Javherbai* v. *Haribhai*(2), *Chintamanrav Natu* v. *Vithabai*(3), *Paramasiva* v. *Krishna*(4), *Martand* v. *Dhondo*(5) and *Mathura Das* v. *Nathuni Lall Mahta*(6), are clear authorities, if any such were needed, showing that such a purchase as is under consideration is not void but creates a good legal title in the buyer unless and until the sale is set aside according to the provisions of section 294, Civil Procedure Code.

The next question is, does the fact that the first plaintiff had applied before the first infructuous sale for leave to bid and obtained it on condition that he was not to bid less than Rs. 1,500 make any difference. In my opinion it does not. In this connection I would suppose that the conditional leave continued in force at the time of the third sale (see *Coaks* v. *Boswell*(7)) at which he actually bought the property for Rs. 436—a sum considerably less than Rs. 1,500. But the leave which was granted to the first plaintiff cannot be said to have the effect of a binding agreement on his part to buy the property for at least Rs. 1,500. If he was then at liberty to avail himself or not of the leave as granted, his buying the property for Rs. 436 would only show that he bought it without availing himself of such leave. I fail to see therefore why the first plaintiff buying the property at the

(1) (1900) I.L.R., 23 Mad., 227 at p. 237.
(2) (1881) I.L.R., 5 Bom., 575.
(3) (1887) I.L.R., 11 Bom., 588.
(4) (1891) I.L.R., 14 Mad., 493.
(5) (1898) I.L.R., 22 Bom., 624 at p. 628.
(6) (1885) I.L.R., 11 Calc., 731.
(7) (1886) 11 App. Cas., 232 at p. 242.

third sale for a sum less than Rs. 1,500 should be in a worse legal position than he would be if he had obtained no leave at all.

I may again refer to *Mahomed Mira Ravuthar* v. *Savvasi Vijaya Raghunadha Gopalar*(1) as showing that the Court should not be hasty in inferring fraud but should, on the other hand, construe strictly and narrowly all charges of fraud. Here the Court holding the sale was quite willing to conclude the bargain for Rs. 436 with the second plaintiff and the fact that the latter bought really for the first plaintiff who had not obtained leave of the Court to buy for that amount cannot be said to vitiate the contract itself. In *Mahomed Gozee Chowdhry* v. *Ram Loll Sen*(2), however, a different view prevailed and that case was subsequently followed in *Srimati Sarat Kumari Debi* v. *Nimai Charm Dely Sircar*(3). In both these cases, the circumstances of which were similar, the learned Judges were of opinion that the conduct of the decree-holder who bought the judgment-debtor's property amounted to an abuse of the process of the Court and therefore disentitled him to the assistance of the Court in enforcing that purchase. But with the greatest deference to the learned Judges who decided those cases I do not see how, if the Court sale passed a legal title subject to its being defeated by an order of the executing Court setting aside the sale, the Court can refuse to recognize his legal title. It is not the case of a plaintiff seeking an equitable relief so that the Court may refuse to grant it in the exercise of its discretion upon one of the well-known principles which guide the exercise of equity jurisdiction. I may also remark that so far as I am aware the phrase "abuse of the process of the Court" is generally used in connection with actions for using some process of the Court, such as, for instance, a writ of attachment taken out maliciously to the injury of another person, and I do not think that the employment of that phraseology helps in any way to indicate the legal effect of a purchase such as this or the legal force of the judgment-debtor's plea in resisting a suit for ejectment.

I am thus of opinion that the sale not having been set aside under section 294, Civil Procedure Code, the plaintiffs are entitled

(1) (1900) I.L.R., 23 Mad., 227 at pp. 232-234.
(2) (1884) I.L.R., 10 Calc., 757.
(3) 5, C.W.N., 265.

to recover possession of the property from the defendants. But it has been argued on the authority of the case of *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha*(1) that if on an application to the executing Court the sale could be set aside the defendants are entitled if in possession to resist a suit for ejectment on the same grounds. This, it is urged, would save a multiplicity of proceedings. I can quite understand that in cases where the sale conveyed no title the defendant should not be compelled by reason of section 244, Civil Procedure Code, to take any step to set it aside. But if I am right in the view that the sale in this case passed an effective title subject to its being defeated at the discretion of the executing Court, the decision in *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha*(1) cannot be said to be in point. And if my appreciation of the legal position of the parties in this suit be correct, the argument based on convenience has no force. Nor do I see how questions bearing upon the exercise of the discretion vested in the executing Court under section 294, Civil Procedure Code, can be properly determined as a matter of defence to a suit like this. The only course open to the defendants was when the facts of the purchase by the first plaintiff in the name of the second plaintiff came to their knowledge to apply to the Court which held the sale to set it aside under section 294, Civil Procedure Code.

In the view I take the appeal should be allowed and the judgments of the Subordinate Courts reversed, but as there are other issues raised which have not been tried the suit must be remanded to the Munsif for the trial of those issues. Costs will follow the result.

This second appeal coming on again for hearing before the Hon'ble Mr. Justice Sankaran-Nair under the provisions of section 575, Civil Procedure Code, His Lordship delivered the following

JUDGMENT.—It is unnecessary for me to recapitulate the facts as they are fully stated in the judgments of my learned colleagues. Section 294 of the Civil Procedure Code is quite clear. It says distinctly that no decree-holder shall bid for or purchase the property "without the express permission of the Court." This provision precluded the first plaintiff from purchasing the property

(1) (1897) I.L.R., 24 Calc., 355.

in the name of the second plaintiff. It is enacted in the interests of the judgment-debtor and other persons interested in the property. They need not therefore impeach the sale. But it is open to them to apply to the Court to set it aside and the Court may "if it thinks fit" set it aside.

As the defendants Nos. 4 and 5 were not aware before the confirmation of the sale that the second plaintiff was not the real purchaser and that it was the first plaintiff decree-holder who purchased the property in the name of the second plaintiff, the confirmation of the sale obviously cannot be a bar to enforcing their right to set aside the sale. My learned colleagues also take the same view. The only question then is whether the defendants may apply to set it aside in this suit in answer to the plaintiff's claim. On this point my learned colleagues differ. Mr. Justice Abdur Rahim taking the view that the executing Court alone can set aside the sale and that the proper course which should have been adopted by the respondents when the fact of the purchase by the first plaintiff came to their knowledge was to apply to the Court which held the sale to set it aside under section 294, while Mr. Justice Miller held, following the decisions referred to in his judgment, that it was open to the Court which tried this suit to set it aside.

It does not appear to have been brought to the notice of my learned colleagues, at any rate they have not noticed the fact, that the Court which executed the decree is also the Court which tried this suit.

It has been held and in my opinion rightly that in such cases section 244 is not a bar to the determination of the questions therein referred to by separate suit. The plaint in the suit is, or will be treated as, the application under section 244, Civil Procedure Code. Nor is there anything to prevent the Court, for the same reasons, from treating a written statement containing a prayer to set aside a sale as an application to set it aside under sections 244 and 294. If a defendant would, in a suit brought or application made by him, be entitled to a relief, which would be a complete answer to a plaintiff's claim, then as a defendant he is entitled to put forward his claim, unless he is estopped or otherwise barred by any rule of law. I can find no such bar in this case. I agree with the decision in Second Appeal No. 616 of 1903 which

follows the case of *Bhiram Ali Shaik Shikdar* v. *Gopi Kanth Shaha*(1).

The next question is whether the sale should now be upheld. Where a decree-holder purchases property in contravention of the provisions of section 294 and the judgment-debtor seeks to set aside the sale, I am of opinion that it is unnecessary for the latter to allege fraud or that the property has not been sold for its proper value; it is for the decree-holder to satisfy the Court that the sale should be confirmed. The decree-holder is in a more advantageous position than any other intending purchaser. However that may be, in this case, the burden of proving that the sale should be upheld is clearly on the plaintiff, as the purchase price was less than the amount lent on the land, less than the amount below which he was not to bid for the property under the order obtained by him and also as the purchase was made *benamee* for the purpose of concealing the matter from the Court or the defendants. Secrecy *primâ facie* implies fraud. I do not think it necessary therefore to call for any finding. I confirm the decree and dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Munro.

CHELLATHAMMAL (APPELLANTS), PETITIONERS,

v.

AMMAYAPPA MUDALIAR (PETITIONER), RESPONDENT.*

1908. December 2, 3.

Lunacy Act, XXXV of 1858, Power of Court to control guardian appointed under Act.

A District Judge, who has appointed a guardian for a lunatic under Act XXXV of 1858, has jurisdiction to make an order requiring such guardian to obtain his permission before marrying the lunatic.

APPEAL against the order of C. G. Spencer, District Judge of Tinnevelly in Interlocutory Application No. 313 of 1907 in Original Petition No. 200 of 1904.

The respondent was appointed guardian of her lunatic son by the District Court under Act, XXXV of 1858. The petitioner

(1) (1897) I.L.R., 24 Calc., 355.

* Appeal against Order No. 64 of 1908.

put in a petition that respondent was trying to contract an improper marriage for her lunatic son and thereupon the District Judge ordered that the respondent or anyone else, trying to get the lunatic married, should obtain the consent of Court before doing so.

Against this order the respondent appealed.

Joseph Satya Nadar for appellant.

R. Rungaswami Ayyangar for *K. Srinivasa Ayyangar* for respondent.

JUDGMENT.—It is beyond question that the order of the District Judge is a proper order in so far as it requires the guardian to obtain his permission before celebrating the marriage of his lunatic son, provided that he had jurisdiction to make it.

There is no provision in the Act under which the guardian is appointed declaring what are the powers of the Court after appointment, but it was conceded by Mr. Satya Nadar that we are not on that account to deny to the Court all powers of control over the guardian. He was prepared to admit that if the guardian contemplated an improper marriage of the lunatic, the Court could interfere if the proposal was brought to its notice. If that is conceded there is no ground that we can see for holding that the Court is not empowered to require the guardian to obtain its permission before arranging a marriage; otherwise the power of interference might be ineffectual in some cases in which its exercise is most desirable.

In *In the matter of Basharat Ali Chowdhry*(1), it is held to be unquestionable that the guardian is in complete subordination to the Court which appointed and can remove him and the power to control so important a matter as marriage is a power which ought not lightly to be denied to the Court.

It will not, no doubt, as a rule, interfere with the choice made by the guardian and the family in the matter of marriage, but that is not a reason why it should not have the power to do so if need be.

In the case of minors the Court has required (*Re. Gulbai and Lilbai*(2)), as consent to be obtained to a marriage (see also *Shridhar* v. *Hiralal Vithal*(3)), and the considerations which

(1) (1897) I.L.R., 24 Calc., 133. (2) (1908) I.L.R., 32 Bom., 50 at p. 58.
(3) (1888) I.L.R., 12 Bom., 480.

apply to a minor are, speaking generally, applicable also to a lunatic.

We agree with these decisions and we have no doubt that the District Judge had jurisdiction to make the order requiring the guardian to obtain his permission before marrying the lunatic.

The question whether the Hindu Law allows a male lunatic to contract a valid marriage is not one which we are called on to decide.

We dismiss the appeal with costs.

APPELLATE CRIMINAL.

Before Mr. Justice Miller.

PALANIANDY PILLAI 1908. November 9.

v.

ARUNACHELLUM PILLAI.*

Criminal Procedure Code, Act V of 1898, s. 197—Sanction not necessary to prosecute a Village Magistrate for making a false record.

Sanction under section 197 of the Code of Criminal Procedure is not required to prosecute a Judge for any act, which is not done by him as such Judge.

Municipal Commissioners for the City of Madras v. *Major Bell*, [(1902) I.L.R., 25 Mad., 15 at p. 23], referred to.

A Village Magistrate, in trying a case, is not bound to make any record; and in fabricating a false record of an alleged criminal case, which had no existence, he is not acting as a Judge. No sanction is required under section 197 of the Code of Criminal Procedure for prosecuting him for such offence.

PETITION under sections 435 and 439 of the Code of Criminal Procedure praying the High Court to revise the order of S. N. V. Rajachar, Sub-Divisional Magistrate of Dindigul, in his proceedings, dated 27th May 1908, in Criminal Case Nos. 37 and 38 of 1908 on the file of his Court.

The facts of the case are stated in the order of the Sub-Divisional Magistrate the material portion of which is as follows:—

The offence complained of is that the Village Magistrate of Mattaparai, Dindigul taluk, has fabricated false evidence in that he has framed a false record in his register convicting the complainant Arunachellum Pillai for theft of pumpkins worth As. 2 and

* Criminal Revision Case No. 272 of 1908.

MILLER, J.

PALANIANDY PILLAI v. ARUNACHELLUM PILLAI.

put him in stocks for 2 hours while, as alleged by the prosecution, it would appear that no such offence was committed, no enquiry held by Village Munsif, no sentence passed and no punishment was undergone by the complainant.

Thereupon the vakil for the complainant put in two complaints against the Village Munsif, one for an offence under section 193, Indian Penal Code, and the other against the Village Munsif and two others—witness No. 3 examined by the Village Munsif in the petty theft case above referred to—under sections 193, 465, 466, 469, 471 and 500, Indian Penal Code, and both of the above cases have come up for enquiry to-day.

Before proceedings with the enquiry the vakil for the Village Munsif raises a preliminary objection that the sanction of the District Magistrate is necessary before the Village Munsif could be prosecuted for an offence under section 193, Indian Penal Code, and says that the Village Munsif's act is inseparable from that of a Judge.

I think that the Village Munsif not being required by law to maintain the criminal register must have made the entries complained of in his private capacity taking advantage of his position as a Village Magistrate. He cannot therefore be said to have acted in his judicial capacity as a Village Magistrate when he framed the false record. No sanction is therefore necessary to prosecute him under section 193, Indian Penal Code.

S. Venkatachariar for petitioner.

M. Narayanaswami Ayyar for respondent.

ORDER.—In this case the Village Magistrate is alleged to have fabricated a record of a criminal case according to the complainant there was no such case and the whole record is evolved from the malicious imagination of the Village Magistrate who desired to provide evidence for use in the future. The question is whether section 197 of the Code applies so that he cannot be prosecuted without the sanction required by that section. This will be so if he is accused as a Judge but not otherwise.

The Regulation XI of 1816 does not require the Magistrate trying a case to make any record, and no doubt it was not intended that he should do so, what is required is that the Karnam shall maintain a register of persons confined by order of the Village Magistrate. The Village Magistrate was not therefore bound to make a record "as a Judge" and it seems to me that the Magistrate is right in holding that he was not acting as a Judge when he made it if he did make it.

MILLER, J.

PALANIANDY PILLAI v. ARUNACHELLUM PILLAI.

The case of *Imperatrix* v. *Lakshman Sakharam, Vaman Hari and Balaji Krishna*(1) is not to be distinguished from the present, unless it may be (though that is not clear from the report) that the Māhālkāri there was bound to keep a record of his proceedings. There it is said that section 466 of the then Code extended to all acts ostensibly done by a public servant, *i.e.*, acts which would have no special signification except as acts done by a public servant, and the learned Judges thought it "proper that the alleged fabricator should be dealt with in his official capacity."

It seems to me, however, that the fabrication cannot be said to be in any way inseparable from the execution of the office of Judge. Any one could have done it who had access to the register kept by the Karnam or the Village Magistrate, and, though the effect of it would be to give the impression that the Village Magistrate in a certain case had acted as Judge, he would not, if the charge is true, have in fact done so. Assuming the fabrication to be an act which purported to be done by the Magistrate in his capacity of Judge sanction is not, under the present Code, necessarily required for his prosecution, *The Municipal Commissioners for the City of Madras* v. *Major Bell*(2). That case and the case of *Nando Lal Basak* v. *Mitter*(3), both of which were decided under the present Code, seem to me to support the view I take that sanction in the present case is not required. In *Athangarayan* v. *Gopalan*(4), where the lower Courts relying on *Imperatrix* v. *Lakshman Sakharam, Vaman Hari and Balaji Krishna*(1) held that a Village Magistrate extorting money on threat of making a report in his magisterial capacity could not be prosecuted without sanction, this Court held that he could be so prosecuted as he was not when committing the offence acting as a Judge. (See also *Kandasami Chetti* v. *Soli Goundan*(5).) I do not see how a Magistrate who fabricates a record in which he figures as Judge can properly be said to be acting as Judge when he does so.

For these reasons I dismiss the petition.

(1) (1878) I.L.R., 2 Bom., 481 at p. 485.
(2) (1902) I.L.R., 25 Mad., 15 at p. 23.
(3) (1899) I.L.R., 26 Calc., 852.
(4) Crl., R.C. No. 61 of 1904 (unreported).
(5) (1900) I.L.R., 23 Mad., 540.

APPELLATE CRIMINAL—FULL BENCH.

Before Mr. Justice Benson, Mr. Justice Munro and Mr. Justice Sankaran-Nair.

1909. January 8, 11, 15, February 8.

THE SESSIONS JUDGE OF TINNEVELLY DIVISION

v.

SIVAN CHETTI.*

Penal Code—Act XLV of 1860, s. 211—Complaint to Village Magistrate is a charge and an institution of criminal proceedings within the meaning of section 211, Indian Penal Code, if it is his duty to forward such complaint for action by the Police—Criminal Procedure Code, ss. 45, 154, 161 and 162.

On the question raised by a reference from the Sessions Judge whether a person giving false information about an alleged offence to a Village Magistrate can be prosecuted for an offence under section 211 of the Indian Penal Code:

Held, per BENSON and MUNRO, JJ. (SANKARAN-NAIR, J., dissenting), that a false complaint to a Village Magistrate of an offence, when the information is one which under section 45 of the Code of Criminal Procedure, the Village Magistrate is bound to pass on to the higher constituted authorities, will amount to an offence under section 211 of the Indian Penal Code.

The words 'false charge' in section 211 must not be understood in a technical or restricted sense, but in its ordinary meaning of a false accusation made to any authority bound by law to investigate it or to take any steps in regard to it, such as giving information of it to superior authorities; and institution of criminal proceedings includes the setting of the criminal law in motion.

The complaint to the Village Magistrate, in such a case, amounts to a "charge," and is also an institution of criminal proceedings within section 211 of the Code of Criminal Procedure.

It would be otherwise, if the offence complained of is one in regard to which the information need not, under section 45 of the Code of Criminal Procedure, be passed to the higher authorities.

Ramana Gowd v. *Emperor* [(1908), I.L.R., 31 Mad., 506], dissented from.

Obiter: The making of a complaint to any of the other persons who, under section 45 of the Code of Criminal Procedure, are bound to pass such information to higher authorities, may also fall within section 211, Indian Penal Code.

Per SANKARAN-NAIR, J.—Where information of an offence, 'given to a Village Magistrate,' is forwarded by him to a Police Officer and the latter takes a written statement from the person giving such information, such statement is not one taken under section 154 but under sections 161 and 162 of the Code of Criminal Procedure. It is not a complaint, but a statement by a witness in an investigation under section 157, and no charge under section 211, Indian Penal Code, can

* Criminal Miscellaneous Petition No. 289 of 1908.

be founded on such statement. To constitute a 'false charge,' it must be made to a Court or officer, who has powers to investigate and send up for trial.

Section 45 of the Code of Criminal Procedure imposes the duty of forwarding information to superior authorities on a number of persons other than Village Magistrates, and the Legislature could not have intended to constitute all such persons authorities before whom criminal proceedings may be instituted.

Section 45 does not impose the duty of reporting in the case of bailable offences and if the duty to report is taken as the determining test, it will follow that the information is to be considered as a proceeding in some cases and in others not.

APPLICATION to the High Court to quash the commitment of one Sivan Chetti, the accused in P.R. Case No. 8 of 1908 on the file of the Stationary Second-class Magistrate of Ottappidáram, to the Sessions Court, Tinnevelly (Sessions Case No. 83 of 1908).

The facts are sufficiently set out in the following letter of reference by A. C. Dutt, Sessions Judge of Tinnevelly District.

"In forwarding herewith the records in R.C. No. 8 of 1908 (Sessions Case No. 83 of 1908) on the file of the Stationary Second-class Magistrate, Ottappidáram, I have the honour to report as follows:

2. The accused in this case has been charged by the Sub-Magistrate under section 211 of the Indian Penal Code. The accused appears to have put in a complaint of dacoity to the Village Munsif (*vide* Exhibit A). The Village Munsif thereupon sent a yadast to the Police (*vide* Exhibit C). On receipt of the yadast, the Police Station House-officer came to the village of the offence and took a statement from the accused (*vide* Exhibit D). The statement taken by the Station House-officer is a very lengthy one, and a perusal of it will show that it must have been recorded in answer to questions, many of them in the nature of searching cross-examination. The accused has now been charged under section 211 on the sanction obtained from the Superintendent of Police.

3. In the matter of Veerapilli Penchalugadu reported in Weir's 'Law of Offences,' fourth edition, volume 1, page 194, it has been held that a person who answers questions put to him by a Police Officer making an investigation under section 161 of the Code of Criminal Procedure does not thereby charge any person within the meaning of section 211 of the Indian Penal Code. This decision, as far as I know, has not been authoritatively reported but I have not been able to find any decision of the Madras High

Court in direct conflict with it. In the case of *Emperor* v. *Jonnalagadda Venkatrayudu* (28 Mad., 565), it was held that an offence under section 182, Indian Penal Code, was committed by a person who gave false information to a Village Magistrate which information the Village Magistrate had passed on to the Station House-officer. This ruling however does not directly deal with the point under consideration, for the case before me is one, not under section 182, but under section 211, Indian Penal Code. In the case under consideration I cannot proceed under section 182, Indian Penal Code, as the sanction of the Village Magistrate has not been obtained. It is true that in the ruling just mentioned the High Court quoted with approval a remark of Mr. Mayne to the effect that information given to *A* for the purpose of being passed on to *B*, and which it was his bounden duty so to pass on, must be considered as having been given to *B* so as to justify his taking the complaint in writing under section 154, Criminal Procedure Code. (The High Court in the judgment above quoted states that this observation is to be found on page 592 of Mayne's 'Criminal Law.' I do not know whether the report in question contains a misprint, but as the matter may otherwise puzzle the High Court I wish to point out that the remark in question is contained in page 589 of the second edition of Mayne's 'Criminal Law of India.')

4. That a man examined by a Police Officer in consequence of information received from a Village Magistrate can be punished under section 211, Indian Penal Code, if he makes a false statement is perhaps an inference that can be reasonably drawn from the ruling last quoted, but the section directly under the consideration of the High Court was 182 and not 211. The question appears to have lately been before the High Court in *Ramana Gowd* v. *Emperor* (31 Mad., 506)—Criminal Appeal No. 251 of 1908. I have not seen the judgment in the case authoritatively reported but have only perused it in the supplement to the Madras Police Gazette of August the 29th, 1908. In this case *Emperor* v. *Jonnalagadda Venkatrayudu* (28 Mad., 565) was duly considered and the High Court came to the conclusion that a charge under section 211 would not lie in circumstances very similar to those in the case I am sending up. I am therefore of opinion that as the law at present stands the commitment ought to be quashed.

I therefore request the High Court to quash it under section 215, Criminal Procedure Code."

The Criminal Miscellaneous Petition first came on for hearing before Benson and Sankaran-Nair, JJ., who referred the matter to a Full Bench on the ground that the decisions were conflicting.

The petition again came on for hearing in due course before the Full Bench constituted as above.

The Public Prosecutor for petitioner.

The accused appeared in person. The Court delivered the following

JUDGMENTS.—BENSON AND MUNRO, JJ.—In this case the accused made a complaint of dacoity against certain persons to the Village Munsif, who gave information to the Station House-officer, who then came to the village and took a statement from the accused in which the accused repeated the charge of dacoity against the persons named in his complaint to the Village Munsif. The Police referred the charge as false, and, with the sanction of the Superintendent of Police, the person who made the complaint of dacoity has been proceeded against for an offence under section 211, Indian Penal Code, and has been committed to the Sessions. The question is whether the facts alleged against him amount in law to an offence under section 211, Indian Penal Code. The matter is by no means free from difficulty, and the decisions in regard to it are conflicting. We are, however, of opinion that the question must be answered in the affirmative. The section runs as follows:—"Whoever, with intent to cause injury to any person, institutes or causes to be instituted, any criminal proceeding against that person, or falsely charges any person with having committed an offence, knowing that there is no just or lawful ground for such proceeding or charge against that person," shall be punished as prescribed in the section.

We think that in the present case the complaint to the Village Munsif was a "charge" of dacoity and was also the institution of criminal proceedings against the persons named within the meaning of section 211. The Criminal Procedure Code does not define what constitutes the making of a "charge" of an offence or what amounts to the "institution of criminal proceedings." But, in our opinion, a false "charge" in this section must not be understood in any restricted or technical sense, but in its ordinary

meaning, of a false accusation made to any authority bound by law to investigate it or to take any steps in regard to it, such as giving information of it to superior authorities with a view to investigation or other proceedings, and the institution of criminal proceedings includes the setting of the criminal law in motion. The nature of both expressions, and the difference between them is explained in lucid terms in the decision of the Full Bench of the Calcutta High Court in the case of *Karim Buksh* v. *Queen-Empress*(1). It points out that there may be a charge which does not amount to "the institution of criminal proceedings" and there may be criminal proceedings which do not necessarily involve a "charge" of any offence. As an illustration of the former it points out that "a charge made to the Judge of a Civil Court or to public officers of other kinds, in order to obtain sanction to prosecute may well be a 'charge' but is not the 'institution of criminal proceedings'." It further points out that an aggrieved person may seek to put the criminal law in motion either "by making a charge or in the language of the Code giving information to the Police (section 154)" or he may "lay a charge, or as the Code calls it, a complaint (section 191 before a Magistrate." The Court did not refer to the case of a complaint or information of certain grave offences given to a Village Magistrate, as it was not necessary for the purpose of the question before the Court, but the whole reasoning of the case is, we think, as applicable to such information as to information given to the Police under section 154. Under section 45, Criminal Procedure Code, the Village Magistrate or, as he is called in the section, the "village headman" is bound to "forthwith communicate to the nearest Magistrate or to the officer in charge of the nearest Police Station, whichever is the nearer, any information which he may obtain respecting" certain grave offences of which dacoity is one. In point of fact in this Presidency the complaint or information to the Village Magistrate is ordinarily the first step in setting the criminal law in motion in the case of the grave offences specified in section 45. The injured person hardly ever gives information direct to the Station House-officer of Police (section 154), or makes a complaint (section 191) to the Magistrate. He almost invariably gives information, or makes his complaint, to the Village Magistrate, well knowing that the latter

(1) (1890) I.L.R., 17 Calc., 574.

will report the information or complaint to the Magistrate or the Station House-officer, or to both, which latter is the regular course in this Presidency. He has, in fact, set the criminal law in motion just as effectually as if he had gone direct to the Station House-officer under section 154 or to the Magistrate under section 191, for the village headman is *bound* by law to pass on the information or complaint to those officers. The case would, of course, be different if the information or complaint was not a matter which the village headman was bound by law to pass on to the higher constituted authorities, *In the matter of the Petition of Jamoona*(1). In that case it could not be said that the criminal law was in any way set in motion. But when the information or complaint is one that the village headman is bound by law to pass on, then the language of the Full Bench in the case referred to above, is just as applicable to it as to an information given direct to the Station House-officer or a complaint to the Magistrate.

In the language of the Full Bench, "whichever of these methods is adopted, the thing done by the accuser is the same, that which is called in the one case giving information, in the other making a complaint. In each case the steps that follow are governed by the Criminal Procedure Code. In each the first step taken by the accuser is ordinarily also the last, for from that time the control of the investigation or enquiry passes out of his hands into those of the constituted authorities; subject to this, that if, after an information before the Police, the result of their investigation is adverse to the complainant, he may renew his complaint to the Magistrate. The procedure by information to the Police is by far the more common course of proceeding, especially where any grave offence is alleged. A system similar to the present in these matters was in force when the Penal Code was passed in 1860; it was embodied in the First Procedure Code of 1861, and has been continued ever since."

The village headman was part of the machinery of the law for bringing grave offenders to justice long before the Criminal Procedure Code was passed, and that Code recognized and defined his place in the machinery and imposed definite duties on him in regard to information given or complaints made to him. It is

(1) (1881) I.L.R., 6 Calc., 620.

objected to this view that the Village Magistrate is not the only person who has a statutory duty to give information under section 45, Criminal Procedure Code, and that if a complaint to him can be made the basis of a charge under section 211 information given to the other persons specified in that section can equally well be made the basis of such a charge. Legally that is so, but we see no reason to shrink from the result. In practice, however, it is only to the Village Magistrate that information is given with a view to invoking the action of the Police and superior Magistrates. But if a man made a complaint to one of the other persons having a legal obligation under that section to report to the Police or Magistrate and did this with the intention of setting the criminal law in motion, we think that he would come not only within the terms of the section but within the mischief which the law desired to meet. In the case of *Emperor* v. *Jonnalagadda Venkatrayudu*(1) in which the facts were very similar to the present, a Bench of this Court quoted with approval the remark of Mr. Mayne ("Criminal Law of India," page 589, second edition) "surely information given to *A*, for the purpose of being passed on to *B*, and which it was his bounden duty so to pass on, must be considered as having been given and intended to be given to *B*." In that case this Court also held that when the Station House-officer on receiving information from the Village Magistrate went to the village and examined the complainant, the complainant made a complaint to the Police under section 154. The same view was taken by another Bench of this Court in *Dastgiri Saheb* v. *Emperor*(2). A contrary view was taken in the matter of *Veerapalli Penchalugadu*(3), but the case does not appear to have been argued, and the Court did not deal with the question now before us, viz., whether the information or complaint to the Village Magistrate could be regarded as a false charge or the institution of criminal proceedings. It merely held that the Police Officer was making an investigation under section 161. In *Emperor* v. *Thavasiandi Thevan*(4), another Bench was "disposed to think" that facts similar to those in the present case did not

(1) (1905) I.L.R., 28 Mad., 565 at p. 567.
(2) Crl. App. No. 15 of 1904 (unreported).
(3) Crl. R.C. No. 515 of 1902 (unreported).
(4) Crl. Appl. No. 30 of 1903 (unreported).

warrant a charge of an offence under section 211, but only under section 182, Indian Penal Code.

In a recent case in *Ramana Gowd* v. *Emperor*(1) another Bench of this Court after consideration of the authorities held, on facts similar to those in the present case, that the statement made to the Station House-officer could not be treated as a complaint or charge, but must be regarded as a statement made to a Police Officer in the course of an investigation under section 162, Criminal Procedure Code, and could not be made the basis of a charge under section 211, Indian Penal Code. It also held that the information or complaint to the Village Magistrate could not be regarded as a "charge," because the Village Magistrate had no power "to investigate" the complaint, or as the "institution of criminal proceedings," because in its view it was the report of the Village Magistrate not the person who made a complaint to the Village Magistrate who set the criminal law in motion. For the reasons stated at length in the earlier part of this judgment we are unable to agree with this view. We think that it does not take sufficient account of the position of the Village Magistrate as part of the criminal machinery of the administration and of the legal obligation of the Village Magistrate to take action on the information given or complaint made to him. The reasons for that decision were largely based on the case, *In the matter of the Petition of the Jamoona*(2), but in the latter case the complaint was made to the Station Staff Officer who was not bound by any statutory provisions to investigate it or to take any action whatever in regard to it. We do not think that such a case is an authority with regard to the present case where the Village Magistrate is bound by law to take action and to report the information or complaint to the authorities empowered to investigate or to take cognizance of the alleged offence. It is now settled law that if an aggrieved person gives false information of an offence to the Station House-officer (section 154, Criminal Procedure Code) he may be proceeded against for an offence under section 211 and may be liable to imprisonment for seven years. It seems unreasonable to hold that if the same person gives the same information to the Village Magistrate, knowing and intending that it shall be passed on to the Station House-officer and the superior

(1) (1908) I.L.R., 31 Mad., 506. (2) (1881) I.L.R., 6 Calc., 620.

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Magistrate, he shall not be guilty of any offence under section 211 but only of the lesser offence under section 182, Indian Penal Code, with a liability limited to imprisonment for six months instead of seven years. The language of section 211 does not require us to place any such limitation on its scope and we see no reason for holding that the Legislature intended it. In conclusion, it seems desirable to point out that every information of an offence does not necessarily amount to a charge of an offence. A man might give the information which he had heard from others, and without himself alleging the truth of the information. But that is not the present case. Here the person aggrieved made an accusation of dacoity against certain persons named by him, and charged them as guilty to his own knowledge. In our opinion the accused in the case before us was rightly charged with an offence under section 211, Indian Penal Code, in regard to the information or complaint of dacoity which he laid before the Village Magistrate. We therefore refuse to quash the commitment, and direct the Sessions Judge to proceed to dispose of the case according to law.

SANKARAN-NAIR, J.—The question is whether the commitment made under the following circumstances should be set aside.

Sivan Chetti, the accused, appeared before the Village Magistrate of Karimkulam and made a statement which was reduced to writing that certain persons therein named entered his house the previous night and committed the offence of dacoity by robbing him and the members of his family of considerable property. After stating the facts, he said "I heard this read out. It is correct" and signed it. The statement is attested by a witness and also signed by the Village Magistrate. There was no prayer therein for an enquiry. The Village Magistrate submitted this statement with a report of his own to the Sub-Magistrate (Exhibit B), and sent another report to the Station House-officer (Exhibit C) requesting him to inquire into the case. Thereupon the Station House-officer proceeded to the village and took a statement from the accused (Exhibit B) which the Sessions Judge rightly says shows "that it must have been recorded in answer to questions, many of them in the nature of searching cross-examination." The Police Inspector submitted what is called a referred charge sheet to the Sub-Magistrate who agreed with the Police that the charge was false and struck the case off his file.

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The accused is now prosecuted under section 211 of the Indian Penal Code for instituting false criminal proceedings or a false charge. The charge is that the accused "made a false complaint to the Village Magistrate and to the Station-house Officer." The Sessions Judge being of opinion that, according to a recent decision of this Court in *Ramana Gowd* v. *Emperor*(1), the accused has not commited any offence under section 211, has requested the High Court to set aside the commitment. It is not denied that if the facts alleged by the prosecution are proved, the accused must be convicted of an offence under section 182, Indian Penal Code, of giving false information. It is also admitted by the Public Prosecutor that the decision in *Ramana Gowd* v. *Emperor*(1), is directly in point. But it is argued that that decision should not be followed and the question has accordingly been referred to the Full Bench for decision.

I shall first consider whether the accused is liable to conviction for the statement made to the Police Officer. The Police Officer in charge of a station may investigate any cognizable case within his jurisdiction. It has therefore been held that a false complaint of such an offence to him would make the offender liable to conviction under section 211, Indian Penal Code. Is this statement (Exhibit D) before us a complaint or statement given for the purpose of investigation or is it only a statement made by a witness to a Police Officer in the course of his investigation? The first information given to a Police Officer may be oral or in writing. If given orally, it must be reduced to writing, read over to the *informant* and signed by *him* (section 154). A Police Officer on receiving information shall proceed to investigate the offence (section 157) except in the cases referred to in clause (*a*) of that section. He may require the attendance of witnesses. The witness "shall be bound to answer" all questions, except those referred to in section 161, put to him relating to the accused and the statement so made shall not be signed by the witness nor used as evidence. There is no obligation on his part to answer truly and it has been held that he cannot be convicted for making any false statement. Thus it is clear that the only statement which a Police Officer can ask an informant or a witness to sign is the one made by the first informant under section 154. In the

(1) (1908) I.L.R., 31 Mad., 506 at p. 507.

case before us the Village Magistrate and not the accused was the first informant of the Station House-officer. That information was in writing (Exhibit C). There was therefore nothing to be reduced to writing under section 154. If the information is to be taken as given orally, then the statement should be taken from the Village Magistrate, the informant. I am unable therefore to regard the statement taken from the accused as one legally made under section 154. It is also clear to me that it was really made under sections 161 and 162. After receiving the information (Exhibit C) from the Village Magistrate, the Police Officer was bound to investigate this offence under section 157 and the examination of the accused and any other persons who may have been examined must be taken to have been made under sections 161 and 162. To hold that this is a statement under section 154 would be to deny the protection afforded by law to a person making a statement to the Police under sections 161 and 162. Again, a complaint or the institution of a criminal proceeding is a person's voluntary act. He might state what he likes and no more, whereas under section 161 a person is bound to answer questions and may have to undergo, as in this case, a searching cross-examination. It is difficult to hold Exhibit D which contains statements, against the truth of the complainant's case to be a complaint. If the learned Judges in *Emperor* v. *Jonnalagadda Venkatarayudu*(1) take the contrary view, then I think they are wrong. In the case of *Mallappa Reddi* v. *Emperor*(2) the original information was given to the Station House-officer by the accused of what the judgment treated—as the reference to section 154 shows—as a cognizable offence.

Does the statement (Exhibit A) made to the Village Magistrate come within the scope of section 211? The decided cases are clearly in support of our view maintained in *Ramana Gowd* v. *Emperor*(3) that it does not. *In the matter of the Petition of Jamoona*(4) which was the case of a complaint before a Staff Officer, found to be false after enquiry by the Military authorities the learned Judges said "the Station Staff Officer having neither magisterial nor police powers . . . . . it seems to us that section 211 will not apply. We do not think it is unduly refining

(1) (1905) I.L.R., 28 Mad., 565.
(2) (1904) I.L.R., 27 Mad., 127.
(3) (1908) I.L.R., 31 Mad., 506.
(4) (1881) I.L.R., 6 Calc., 620.

the words of the section to say that the false charge must be made to a Court or to an Officer who has powers to investigate and send up for trial." This case was followed and applied to the case of a complaint before a Village Munsif by Benson and Bhashyam Ayyangar, JJ., in *Emperor* v. *Thavasiandi Thevan*(1). That was an appeal against an acquittal. The lower Court held in that case " . . . . *In the matter of the Petition of Jamoona*(2) lays down that the false charge must be made to a Court or to an Officer who has powers to investigate. Now the Village Magistrate has no magisterial powers except in regard to petty offences. He is not a Court in respect to this offence. The charge under section 211, cannot be sustained." The accused, though it was found he made a false charge to a Village Munsif, was accordingly acquitted. On appeal the High Court held "we are disposed to agree with the Head Assistant Magistrate that the facts alleged do not amount to an offence under section 211, Indian Penal Code." But they directed a trial for an offence under section 182 (*a*). This case is directly in point and was decided on appeal by the local Government against an acquittal.

See also the judgment in the matter of Veerapalli Penchalugadu(3).

To the same effect is the decision of Abdur Rahim, J., and myself in *Ramana Gowd* v. *Emperor*(4).

I see no reason to differ from these decisions. In the words of Mr. Mayne, paragraph 376, commenting on section 211 "a false charge made to a person who has no magisterial or police authority, does not come within section 211." The statement before the Village Magistrate is not the first step in a proceeding which, in the ordinary course, will lead to the conviction of the accused if found guilty. The Village Magistrate cannot enquire into the allegations himself, cannot examine witnesses, cannot place the accused before a Magistrate for trial, cannot do anything to the prejudice of the accused on that statement. It was argued that the power conferred by section 45, Criminal Procedure Code, on the Village Magistrate on receiving the statement to submit a

(1) Crl. Appl. No. 30 of 1903 (unreported).
(2) (1881) I.L.R., 6 Calc., 620.
(3) Crl. R.C. No. 515 of 1902 (unreported).
(4) (1908) I.L.R., 31 Mad., 506.

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report to the Police or the Magistrate shows that the statement must be treated as the institution of a criminal proceeding or making a charge. This power, it will be noticed, is conferred on him in common with any "owner or occupier of land and agent of such owner and occupier." It therefore follows that, if the statement before the Village Magistrate which, of course need not be in writing, is the institution of a criminal proceeding, so is any similar statement made before any occupier of land or his agent. A criminal proceeding can be instituted only in the King's Court or before any person appointed by the King for that purpose, and I find it difficult to believe that the persons abovenamed have been constituted authorities, before whom criminal proceedings may be instituted for the sole reason that they have to communicate any information they might receive about the offence. I need hardly state that the information given to the Village Magistrate is different in every respect from the "criminal information" known to English law which is a statement informing the Magistrate of the offence for which a summons or warrant is required. This information is not even a complaint or an accusation. Further the persons referred to in section 45 including the Village Munsif need not report in bailable cases with a few exceptions, and to the information in such cases, therefore, this argument will not apply. How can it be a proceeding in some cases and not in others? Above all, if the Village Magistrate or the other persons referred to, do not act under section 45 neither the person aggrieved nor any officer has any power under law to compel him to submit the report though he may be punished under the Indian Penal Code. If it were a criminal proceeding, the informant would be entitled to have his statement enquired into and disposed of: and to treat it as a step forward taken for the conviction of the accused, if his guilt is proved. The statement itself need not be transmitted under section 45. It is only the information that has to be communicated.

For the above reasons I am of opinion that the accused cannot be charged for any offence under section 211 on account of the statements made before the Village Magistrate and the Station House-officer. I would therefore quash the commitment.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

1908. November 26, 27, 30, December 1, 2, 3, 16.

BALAKRISHNA IYER AND OTHERS (DEFENDANTS NOS. 1 TO 4), APPELLANTS IN APPEAL SUIT NO. 6 of 1906.

v.

MUTHUSAMI IYER (PLAINTIFF), RESPONDENT IN APPEAL SUIT NO. 6 of 1906, AND APPELLANTS IN APPEAL SUIT No. 23 of 1906.

BALAKRISHNA IYER AND OTHERS (DEFENDANTS), RESPONDENTS * IN APPEAL SUIT NO. 23 of 1906.

Hindu Law—Partition, suit for—Right to account—Claim for share of specific items bar to claim for a general account.

Under the Mitakshara Law, a member of an undivided family who sues for partition, and who has not been excluded from the family is not, unless he establishes fraud or misappropriation, entitled to call upon the managing member to account for his past dealings with the family property.

Abhaychandra Roy Chowdhry v. *Pyari Mohan Guho*, [(1869-70) 5 Beng. L.R., 347], not followed.

Narayan Bin Babaji v. *Nathaji Durgaji*, [(1904) I.L.R., 28 Bom., 201], followed.

Where a plaintiff, suing for partition, prays for general account and claims a share in specific items alleged to have been received by the manager of the family, and attempts to prove the receipt of such items, he will not, on failing to prove such receipt, be allowed to claim a general account.

APPEAL against the decree of V. Subramanyam, Subordinate Judge of Tanjore, in Original Suit No. 29 of 1903.

[This case is reported only on the question of the right to general account in a suit for partition.]

Suit to recover plaintiff's one-half share of joint family properties belonging to plaintiff and defendants Nos. 1 to 4. The first defendant was the father of defendants Nos. 2 to 4 and plaintiff was the grandson of first defendant's paternal uncle. The first defendant was the managing member of the family for nineteen years prior to suit. The plaintiff claimed one-half of the immoveable properties belonging to the family; Rs. 10,000 as his half share of Rs. 20,000 which he alleged the first defendant had saved from the income of the family estate and from money dealings, and a moiety of outstanding and moveables.

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* Appeal Suits Nos. 6 and 23 of 1906.

The fifth issue was whether first defendant was liable to render accounts and if so, for what period, and the eighth issue was whether the first defendant had in his possession Rs. 20,000 saved as alleged by plaintiff. On the fifth issue, the Subordinate Judge held that there was no fraud or misappropriation on the part of first defendant and that he was not liable to render an account of past transactions.

On the eighth issue, he found that first defendant was in possession of Rs. 13,000 belonging to the family. He accordingly decreed to plaintiff one-half of the immoveables and one-half of the sum of Rs. 13,000 and one-half of the mesne profits for 1902–1903 and a moiety of other moveables.

The first defendant appealed (Appeal Suit No. 6 of 1906) substantially against the finding on the eighth issue, and the plaintiff appealed (Appeal Suit No. 23 of 1906) mainly on the ground that he was entitled to a general account.

The Hon. Mr. *V. Krishnaswami Ayyar* and *K. Ramachandra Ayyar* for appellants in Appeal Suit No. 6 of 1906.

P. R. Sundara Ayyar and *G. S. Ramachandra Ayyar* for respondents in the above.

P. R. Sundara Ayyar and *G. S. Ramachandra Ayyar* for appellant in Appeal Suit No. 13 of 1906.

The Hon. Mr. *V. Krishnaswami Ayyar* and *K. Ramachandra Ayyar* for respondent in the above.

JUDGMENT.—Appeal No. 6 is an appeal by the defendants against a decree in a partition suit with reference to certain sums of money which the Subordinate Judge held were payable by the defendants to the plaintiff under the decree. Appeal No. 23 is an appeal by the plaintiff against the same decree. In Appeal No. 23 the plaintiff raised the general question whether he was entitled to an account as incidental to his suit for partition. In his plaint he asked for an account as from October 1884, the date when the first defendant became the managing member of the family. An issue was taken as to whether the first defendant as managing member was liable to render accounts to the plaintiff for any and what period. The Subordinate Judge held that the plaintiff had not made out a case to be entitled to call upon the first defendant to render an account of past transactions. The plaintiff appealed against this finding. There is considerable conflict of authority on the question whether a member of an undivided family

who sues for partition is entitled as of right to call upon the *managing* member to render an account of his dealings with the family property. Mr. Mayne observes (paragraph 294) that the right of each member of an undivided Hindu family to require an account of the management has been both affirmed and denied in decisions which are not very easy to reconcile. The view which has been adopted in Bengal is that a member who sues for partition is so entitled, (see *Abhaychandra Roy Chowdhry* v. *Pyari Mohan Guho*(1)). In Bombay the decisions are not uniform, but in the latest reported case—an authority on which the Subordinate Judge relied—*Narayan Bin Babaji* v. *Nathaji Durgaji*(2) it was held that in a partition suit no coparcener has a right to an account of past transactions. The question is somewhat bare of authority so far as this Presidency is concerned, but the view which has prevailed would seem to be the same as that taken in the Bombay case just referred to. In *Krishna* v. *Subbanna*(3) the actual point decided was that in the case of an infant who has been excluded from the enjoyment of the family property the manager is bound to account to the infant for mesne profits from the date of his exclusion. The learned Judges, however, expressed an opinion (see page 569) that if an adult member is not excluded but chooses to live apart from the manager, as he did not choose to enforce partition, it might be reasonable, apart from any question of fraud or misappropriation by the manager, to apply the principle that unless something is shown to the contrary, every adult member of an undivided family, living in commensality with the manager must be taken to be a participator in, and authorizer of, all that has been done in the management of the property. The learned Judges who decided this case were apparently prepared to extend the principle to which they referred to the case of an adult member who chose to live apart from the manager without enforcing partition. In the case before us the plaintiff who lived as a member of the family at any rate until the end of 1902 claims an account in respect of transactions entered into when he was living with the family as an undivided member thereof.

In the case of *Rama Iyer* v. *Duraisami Iyer and 5 others*(4), Davies and Moore, JJ., set aside a decree ordering an account

(1) (1869-70) 5 Ben. L.R., 347. (2) (1904) I.L.R., 28 Bom., 201.
(3) (1884) I.L.R., 7 Mad., 564. (4) Appeal No. 185 of 1899 (unreported).

of past transactions in a suit for partition. The case of *Raja Setrucherla Ramabhadra* v. *Raja Setrucherla Virabhadra Surya-narayana*(1) was decided by the Privy Council with reference to the special agreement which had been entered into by the members of the family, but it appears to be assumed in the judgment that the managing member is only liable to account as to the state of the property existing at the date of partition. The observation made by the Privy Council in their judgment in *Annamalai Chetty* v. *Murugasa Chetty*(2) that the relation between the managing member and the members of the family is not that of principal and agent, or of partners, but is more like that of trustee and *cestui que trust*, was of course made with reference to the question under consideration in that case and cannot be relied on as expression of opinion by the Privy Council on the question as to how far the managing member may be called on to account. In our opinion the decision in *Abhaychandra Roy Chowdhry* v. *Pyari Mohan Guho*(3), which appears to have been a case decided under the Dayabhaga law is not applicable in the case of a family governed by the Mitakshara law as administered in this Presidency.

A member of a Mitakshara family cannot predicate at any given moment what his share in the family estate is. His share only becomes defined when a partition takes place. It is otherwise under the Dayabhaga law where the law is that applicable to tenants in common and the position of the managing owner approximates more closely to that of a trustee than in the case of a family governed by Mitakshara law. In our opinion a member of an undivided family who sues for partition and who has not been excluded from the family is not, unless he establishes fraud or misappropriation, entitled to call upon the managing member to account for his past dealings with the family property. All he is entitled to is an account of the family property at the time he asks for partition.

Even if, as regards the general question, we were prepared to accept the view taken in *Abhaychandra Roy Chowdhry* v. *Pyari Mohan Guho*(3), it seems to us that in the present case the plaintiff has put himself out of Court so far as any right to claim

(1) (1899) I.L.R., 22 Mad., 470. (2) (1903) I.L.R., 26 Mad., 544.
(3) (1869-70) 5 Ben. L.R., 347.

a general account from the first defendant is concerned. Besides the issue as to whether the plaintiff was entitled to a general account, a specific issue was raised as to whether the first defendant had in his possession Rs. 2[illegible],000, as savings out of the income of the family. In the third schedule to his plaint the plaintiff set out specific items of which he alleged he was entitled to a moiety. The first item is the Rs. 20,000 which the plaintiff estimated as the net income of the family during the period of the management by the first defendant.

The plaintiff sought to make out his case in two ways—first by showing that having regard to the family income and the family expenditure, the first defendant ought to have had in hand, when the suit was brought, this sum of Rs. 20,000, and secondly by showing that the first defendant had in fact received, on behalf of the family, sums of money in excess of Rs. 20,000 for which he was accountable to the plaintiff. It was contended on behalf of the plaintiff that as he could not anticipate what the finding of the Court would be on his claim for a general account he was entitled to show that specific sums had been received by the first defendant. In the Court below the plaintiff called evidence to show that the specific sums had in fact been received by the first defendant, and the items were in part allowed and in part disallowed.

It seems to us that the plaintiff having undertaken to show, item by item, that specific sums had been received by the first defendant on behalf of the family, which sums, in the aggregate, exceeded Rs. 20,000 which the plaintiff alleged the first defendant ought to have in hand as representing family savings, it was not open to him to ask for a general account. The Court below in effect took an account on particulars furnished by the plaintiff. This was done at the plaintiff's instance. In his appeal to this Court the plaintiff makes it one of his grounds of appeal that he is entitled to an account as incidental to a decree for partition; but the specific items which the plaintiff alleges were wrongly disallowed are made the basis of the valuation of the appeal. This being so then there is considerable force in Mr. Krishnaswami Aiyar's contention that the plaintiff is not in his appeal entitled to raise the question of his right to a general account before this Court. It seems to us manifestly unreasonable that the plaintiff, because he is dissatisfied with the amounts awarded to him, should

WHITE, C.J., AND ABDUR RAHIM, J.

BALAKRISHNA IYER v. MUTHUSAMI IYER.

ask us to send the case back for a general account on the ground that the finding of the Subordinate Judge that the plaintiff was not entitled to a general account of past transactions was wrong.

There is evidence in this case that the rendering of a general account by the first defendant is impossible by reason of the fact that the family accounts are in the possession of the plaintiff. In the view we take on the general question of the right of a member of an undivided family to an account from the manager in respect of past transactions, and on the question of the plaintiff's rights in this connection in this particular case, we do not think it necessary to discuss this evidence.

We now proceed to consider the evidence with regard to the specific items which the plaintiff alleges were received by the first defendant, and for which the first defendant is accountable to him.

[Their Lordships then went into the evidence, and allowing Appeal No. 6 of 1906, modified the decree of the lower Court.]

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

1908. December 4, 22.

ABDUL KHADER AND OTHERS (DEFENDANTS NOS. 2 TO 6), APPELLANTS,

v.

CHIDAMBARAM CHETTIYAR AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1 AND 2), RESPONDENTS.*

Muhammadan Law—Partner, death of, effect on partnership—Guardian of property, who is—Power of de facto guardian to bind minor—Who is de facto guardian.

Under Muhammadan, as under English, law, the death of a partner dissolves the partnership.

The Muhammadan law does not recognise the joint family tenure of property prevailing among Hindus; and the rights and obligations incident to such tenure will not apply among Muhammadans.

Co-owners under Muhammadan law hold their property in severalty.

On the death of a Muhammadan, his heirs take their shares in severalty, as heirs and not as members of the family.

* Appeal No. 169 of 1905.

WHITE, C.J., AND ABDUR RAHIM, J.

ABDUL KHADER v. CHIDAMBARAM CHETTIYAR.

One who is not a guardian under Muhammadan law, cannot by taking possession of the minor's property and dealing with it, claim the right to bind the minor by his acts as *de facto* guardian.

Mafazzal Hosain v. *Basid Sheikh*, [(1907) I.L.R., 34 Calc., 36], distinguished.

Under Muhammadan law, the father and his executors are the guardians of the minor's property and failing them, the grandfather and his executors. Failing these the Court must appoint a proper guardian.

A, B and C, three Muhammadan brothers carried on a partnership business. A died leaving behind two minor sons D and E. B and C carried on the business for themselves and the minors and borrowed sums for the purposes of such business:

Held, that B and C had no power either as partners or managers of a joint family to bind D and E by their obligations; and not being guardians under Muhammadan law and not having been appointed by the Court as such, they had no power to act as *guardian de facto* for the minor sons.

APPEAL against the decree of T. Sadasiva Ayyar, Subordinate Judge of Tinnevelly, in Original Suit No. 6 of 1904.

The facts are sufficiently stated in the judgment.

C. R. Tiruvenkata Chariar and *K. R. Krishnaswami Ayyangar* for appellants.

A. S. Balasubrahmania Ayyar for first respondent.

JUDGMENT.—Assuming the facts of the case to be as found by the Subordinate Judge of Tinnevelly, the question raised for our decision in this appeal is whether the defendants Nos. 3 to 6 in the action have been rightly held to be liable on the promissory note for Rs. 5,000 (exhibit A) executed in favour of the plaintiff by the defendants Nos. 1 and 2 on the 17th May 1902 under the following circumstances. Defendants Nos. 3 to 6 who were minors not only at the time when the money sought to be recovered was advanced by the plaintiff but also at the date of the institution of the suit, are the children of one Mowl Ally Tharagan, a Muhammadan, and the defendants Nos. 1 and 2 are Mowl Ally's brothers. The three brothers lived together and traded jointly until 1896 when Mowl Ally died. The first defendant who, soon after Mowl Ally's death, married his widow, the mother of the defendants Nos. 3 to 6, carried on the old business jointly with the second defendant on behalf, not only of themselves but of the defendants Nos. 3 to 6 who lived under the protection of the first defendant, the latter purporting to act as their guardian. The sum of money in question was borrowed for the purposes of this business which appears to have proved a financial failure in the hands of the first and the second defendants.

The Subordinate Judge has passed a decree against all the defendants and against the minor defendants whose appeal we have to consider; the decree is to the effect that the plaintiff will recover from them Rs. 4,718-12-0, the amount found to be owing on the promissory note, to the extent of their interest in the assets and properties belonging to the business.

The Subordinate Judge does not tell us upon what principle of law he has based the liability of the appellants. If he has proceeded upon the law governing the joint family tenure of property among the Hindus as he would seem to have done, he has clearly fallen into an error. Such a system of holding property is not recognised by the Muhammadan law, and the principle on which that system is founded cannot be applied to the determination of questions relating to the tenure and devolution of property among Muhammadans. No doubt it would be otherwise in the case of a family which may be proved to have adopted by custom having the force of law the joint family mode of holding property; but no such custom is alleged in the present case. Under the Muhammadan law a co-owner is presumed in the absence of an express contract to the contrary to hold his property in severalty whether that property represents a share in, tangible, moveable or immoveable property, chose in action, or a trading concern.

The business in which Mowl Ally was interested must be treated as an ordinary partnership concern with all its incidents. On his death the partnership came to an end. On this point the Muhammadan law is at one with the English law. In the Hedaya it is laid down (see Hamilton's 'Transaction,' Bensley Edition, Volume II, page 328, or Grady's Edition, page 229).

"If one of two partners die . . . . the contract of partnership is annulled; because a contract of partnership comprehends an appointment of agency, which is essential to the existence of partnership, for the reasons already assigned; now *agency* is annulled by *death* . . . . Upon the *agency*, therefore, being annulled, the contract of partnership is also annulled."

The partnership being thus dissolved by Mowl Ally's death his interest in the assets descended to his heirs who are his widow and his children, the defendants Nos. 3 to 6, in the shares allotted to them by the Muhammadan law. They do not succeed, it must

be remembered, by reason of their being members of his family, though they may have lived as such, for the question of succession or heirship in Muhammadan law in no way depends upon the fact whether the persons designated by the law as heirs were members of the family of the propositus or not. And as already indicated each heir took his share in severalty subject, as between himself and the other heirs, to the payment of a proportionate share of the debts of the deceased, although the creditors of the deceased might be entitled to realise the entire debt from the share of one of the heirs. It may also be that for certain purposes and in certain circumstances one of the several heirs would represent the whole estate, but in this case it is unnecessary to discuss that question as the defendants Nos. 1 and 2 are not heirs of Mowl Ally at all.

What authority then had the defendants Nos. 1 and 2 to contract the debt on behalf of the defendants Nos. 3 to 6? They had no such authority as partners, for the partnership ceased to exist on Mowl Ally's death, and the debt in question was not contracted in the course of the winding up of the affairs of the partnership. Nor did they derive any authority from the fact that they were the managing or senior members of the same family as the appellants (see *Pathummabi* v. *Vittil Ummachabi*(1)). But it is argued on behalf of the plaintiff that the defendants Nos. 1 and 2 acted as *de facto* guardians of the appellants and that gave them the power. If in fact they had no legal status as guardians as we shall presently point out, this argument necessarily involves the proposition that if a person not recognised by the law as the guardian of a minor gets hold of the minor's property and chooses to speculate with it, any debts incurred by him in the course of the business will bind the minor's property, provided he purported to act, and we shall assume in good faith, for the benefit of the minor. We have not been referred to any authority which goes to the length of supporting such a contention which on its very face is untenable, nor are we aware of any. On the other hand, the decisions *Nizam-ud-din Shah* v. *Anandi Prasad*(2) and *Moyna Bibi* v. *Banku Behari Biswas*(3) are authorities against the soundness of the plaintiff's proposition.

(1) (1903) I.L.R., 26 Mad., 734. (2) (1896) I.L.R., 18 All., 373.
(3) (1902) I.L.R., 29 Calc., 473.

The ruling in the case of *Mafazzal Hosain* v. *Basid Sheikh*(1) cited by the vakil for the respondent has no application as the transaction upheld there was found to be to the manifest advantage of the minor and was entered into under circumstances of necessity. In the Muhammadan, no less than in the English system of law, the State is especially charged with the care of the person and property of minors, and when the Muhammadan law recognises the right of certain relatives to act as guardian it does so on the assumption that the particular ties of relationship are a guarantee that such person would act for the benefit of the ward. Even in these cases the law defines and limits the authority of the guardian and vests the Court with powers of constant supervision and control. In Muhammadan law the right to the custody of an infant's person and his property does not in all cases reside in the same individual. So far as the minor's property is concerned the law concedes the right of guardianship only to the father or his executor, and in the absence of either to the grandfather or his executor. Failing these the Court must appoint a proper guardian (see Wilson's 'Anglo Muhammadan law,' page 209). The defendants Nos. 1 and 2 were not appointed guardians by the Court nor is it suggested that they were so appointed by the father of the minors. We are not therefore called upon to discuss the powers of a lawful guardian under the Muhammadan law to deal with his ward's property, nor, having regard to the admitted facts of this case, is it necessary to consider those decisions of which *Mafazzal Hosain* v. *Basid Sheikh*(1) is the type and in which dealings by a person described as the natural guardian have been upheld as being to the obvious advantage of the minor.

The plaintiff, who made advances to the defendants Nos. 1 and 2 in the course of the business which they carried on, is not thus entitled to hold the minor's interest in the assets of the business which their father carried on jointly with the defendants Nos. 1 and 2 or what now represents such interest liable for the debt. On this ground alone the appeal must be allowed and we have therefore thought it unnecessary to consider the other questions raised in the grounds of appeal. The decree of the Subordinate

(1) (1907) I.L.R., 34 Calc., 36.

Judge so far as it gives any relief against the appellants is discharged, and the suit as against them must be dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Pinhey.

SRINIVASASWAMI AIYANGAR (DEFENDANT), APPELLANT,

v.

ATHMARAMA AIYAR (PLAINTIFF), RESPONDENT.*

1908. October 21. November 25.

Evidence Act, I of 1872, s. 92 (4)—Evidence of oral agreement to rescind or of subsequent conduct inadmissible—Mortgagee, right of usufructory, to sue for part of mortgaged property.

Section 92 (4) of the Evidence Act precludes evidence of an oral agreement to rescind a registered contract or of subsequent conduct of parties to show that such contract was treated as non-existent.

An usufructory mortgagee may sue for possession of only a part of the properties mortgaged.

SECOND APPEALS against the decrees of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit Nos. 942 and 943 of 1906, respectively, presented against the decree of P. Aiyasami Mudaliar, District Munsif of Tiruvadi, in Original Suit No. 105 of 1905.

Suit to recover possession of the plaint land with mesne profits. The plaint alleged that the plaint land originally belonged to Madusami Govinda Rao Suriavamsi; that he usufructuarily mortgaged the plaint land and other lands to one Amba Boi Ammal for Rs. 65,000 on 14th September 1895 and received Rs. 65,535-8-11; that Amba Boi Ammal leased the plaint land and other lands and enjoyed the kar produce of 1895, that Madusami Govinda Rao trespassed upon the lands in March 1896, that the plaintiff got a decree against Amba Boi Ammal in Original Suit No. 610 of 1896, in the District Munsif's Court of Tanjore, and in execution purchased her usufructuary mortgage right on 26th September 1900 and took delivery of the property on 9th December 1903, that the defendant obstructed and applied

* Second Appeal Nos. 1440 and 1441 of 1907.

MUNRO AND PINHEY, JJ.

SRINIVASA-SWAMI AIYANGAR v. ATHMARAMA AIYAR.

to have the delivery set aside and it was set aside on 8th February 1904.

The defendant pleaded that Amba Boi Ammal did not pay any money on the mortgage and never enjoyed the lands, that the plaintiff cannot split the mortgage; that he was not entitled to claim a charge on the property for a portion of the amount paid; that the decree in Original Suit No. 610 of 1896 was obtained fraudulently; that he purchased the plaint land from Madusami Govinda Rao on 30th November 1896 and was enjoying the land ever since, and that the mesne profits claimed are excessive.

The District Munsif found that only Rs. 6,500 was paid to the mortgagor and that by the subsequent conduct of the parties, the mortgage was treated as cancelled. He dismissed the suit.

On appeal his judgment was reversed, and plaintiff obtained a decree for possession.

The defendant appealed to the High Court.

T. Rangachariar for appellant.

G. S. Ramachandra Ayyar for respondent.

JUDGMENT.—We think the decrees of the District Judge are right. The contention that the mortgage to Amba Boi never came into force is clearly unsustainable. The mortgage is evidenced by a registered mortgage deed, and possession passed thereunder to Amba Boi. There is no provision in the deed that the mortgage should come into operation only on the payment of the whole sum of Rs. 65,000, which Amba Boi agreed to advance. The further contention that the mortgage, even if it did come into operation, no longer subsists must also fail. The registered mortgage deed has not been cancelled by any registered instrument, and evidence of any oral agreement to rescind it is shut out by section 92 (4) of the Evidence Act. The conduct of the parties as shown by exhibits B and II is relied upon as showing that they considered the mortgage was at an end. In other words an agreement to consider the mortgage at an end is sought to be inferred from exhibits B and II. Proof of such an agreement is equally shut out by section 92 (4) of the Evidence Act—*vide* ***Mayandi Chetti*** v. *Oliver*(1). Then it is said that the circumstances justified the mortgagor in cancelling the mortgage and that he did in fact cancel it—section 39 of the Contract Act is relied

(1) (1899) I.L.R., 22 Mad., 261.

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upon. It is unnecessary to consider whether section 39 of the Contract Act would apply to a case like the present in view of the findings of the District Judge that the defendants did not make out either that the mortgagor repudiated the mortgage or would have been justified in doing so. The finding that there was no repudiation of the mortgage is attacked on the ground that the District Judge drew an adverse inference from the fact that the mortgagor was not examined, though the mortgagor was in fact dead. Even if the District Judge had not fallen into this error, his finding would clearly have been the same, as he bases it on the ground of insufficiency of proof, and the finding that the evidence is not sufficient is correct in law. On the question of estoppel we also think that the District Judge is right. There remains only one other contention to be noticed. The lands which the plaintiff in each of these suits is seeking to recover are only portions of the property, mortgaged to Amba Boi, and it is contended that the plaintiff is trying to split the mortgage. This, however, is not so. Amba Boi remained in possession of the mortgaged property for some time and then lost possession. She was entitled to sue to recover the whole of the property which under the terms of the mortgage she was entitled to enjoy in lieu of interest for 15 years. But she was not bound to sue for possession of the whole or any part of the property, and if she chose to be content with possession of a portion and to sue for that portion no one could compel her to sue for more than she wanted, though, of course, her action would in no way affect the liability of the whole of the property comprised in the mortgage for the money advanced by her under the mortgage. The plaintiff stands in the shoes of Amba Boi. The appeals fail and are dismissed with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

1907. October 16. 1908. May 5. 1909. January 7, 8, 11, 12, 18.

SESHAN PATTER (THIRD DEFENDANT), APPELLANT,

v.

VEERA RAGHAVAN PATTER AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 2, 5 TO 8, 10 TO 22, 24 TO 27 AND 29 TO 45), RESPONDENTS.*

Right of suit*—*Suit by one member of an undivided family on contract in his name for the benefit of family not maintainable though the others acquiesce*—*Limitation Act, sch. II, art. 75*—*Waiver*—*Resolution of meeting, not convened according to rules but notified to all members*—*Account stated, when enforceable as a fresh contract*—*Second appeal, whom appellant ought to make parties to.

Where the rules of a gramajenam provide that resolutions passed at a general meeting shall be binding on all the members, a resolution at a general meeting held after notice to all the members, will be so binding, although the meeting was not convened in the manner laid down by the rules.

The general authority to bind all members by a resolution will include an authority to make an acknowledgment or to enter into a fresh contract on behalf of all the members.

A resolution, accepting accounts and agreeing to pay in instalments, is a fresh contract, on which a suit may be brought.

Where the benefit of a contract belongs to an undivided family and a fresh contract by which the original contract is discharged is entered into in the name of one only of the members of such family, all the members of the family are necessary parties to a suit on the fresh contract. A suit brought by the member in whose name the contract was made must be dismissed, when the other members are joined as parties after the period of limitation had expired; and the acquiescence of the other members will not cure such defect.

Mere abstinence from suing will not constitute such a waiver as will postpone the starting point of limitation in cases falling within article 75 of schedule II of the Limitation Act.

Ramanujachariar v. *Srinivasachariar*, [(1899) 9 M.L.J., 103], not followed.

Adaikkalam Chetty v. *Marimuthu*, [(1899) I.L.R., 22 Mad., 326], not followed.

An appellant on second appeal ought to add as parties all those whom he had made parties in his appeal to the lower Appellate Court.

SECOND APPEAL against the decree of S. Raghunathaiya, Subordinate Judge of Palghat, in Appeal Suit No. 333 of 1904, presented against the decree of P. P. Raman Menon, District Munsif of Palghat, in Original Suit No. 141 of 1903.

* Second Appeal No. 1524 of 1904.

WHITE, C.J., AND MILLER, J.

SESHAN PATTER v. VEERA RAGHAVAN PATTER

Suit to recover money. The plaintiffs and defendants were members of a Devasom, and the plaintiffs, who were undivided brothers, had money dealings with the Devasom. For the conduct of business, the members of the Devasom had framed certain rules. The rules authorised the secretary to convene a general meeting on the requisition of not less than 10 members; and the resolution of the majority at such meeting was to be binding on all the members.

On the 22nd April 1899 a general meeting was held which was not convened on the requisition of 10 members, but all the members had notice of such meeting. At that meeting the accounts of the dealings with plaintiffs was looked into and a resolution was passed that Rs 800 was due to plaintiffs and the Devasom was to pay it in three instalments—in April, August and October 1900;—the whole amount to become payable in default of payment of any instalment.

A document embodying these terms (exhibit A) was executed by the members present in favour of the first plaintiff. None of the instalments were paid, and this suit was instituted by the first plaintiff alone against all the members of the Devasom on 2nd June 1903, the day on which the Court reopened after the holidays.

The Court was closed when three years from the date of the first instalment expired. On the objection of defendants, the second plaintiff was added in September 1903.

The defendants who did not attend the meeting pleaded that exhibit A was not binding on them, and that the suit was barred by limitation.

The District Munsif passed a decree in favour of the plaintiff against all the defendants and the Subordinate Judge confirmed his decision on appeal. His judgment on the question of limitation was as follows:—

"Supposing the suit to be also for the sum found due at the last settlement, plaintiff is the manager of the joint family (*vide* the evidence of plaintiff's witnesses Nos. 3 and 4). He it is that institutes suits for money due to the business, and this suit does not appear to have been brought by the plaintiff, otherwise than under the acquiescence of his brother the second plaintiff, who readily joined him as supplemental plaintiff and who deposes that he had permitted him to institute this suit. So, if the plaintiff

had described himself as manager the suit would have been under the above circumstances unobjectionable. Plaintiff has been ill-advised for omitting to move for this necessary amendment also. But, it must be observed that at the settlement of 1074 (1899) not only was the amount found and acknowledged to be due, but was also promised to be paid to the plaintiff in three instalments with interest at 10 annas per cent. per mensem and in case of default to pay one instalment, to be paid in one lump at the same rate of interest (*vide* A and B). Thus the contract of the Devasom was with the plaintiff himself under A and B. They do not show that the debt is one due to his family and accordingly, plaintiff alone can maintain a suit on it (*vide* IX, Madras Law Journal, 103, and I.L.R., 22 Madras, 327). So I hold that the plaintiff's claim is not time barred."

The third defendant appealed to High Court making the plaintiffs alone respondents. In the lower Appellate Court the third defendant and 16 other defendants were appellants and the plaintiffs and the other 28 defendants were respondents.

P. R. Sundara Ayyar for appellant.

L. A. Govindaragava Ayyar for the Hon. Mr. *V. Krishnasawmi Ayyar* for first and second respondents.

JUDGMENT.—The plaintiff has taken the preliminary objection that an agreement was entered into on behalf of the third defendant (appellant) to settle the affairs of the temple and to withdraw the appeal. This is denied by the third defendant.

Affidavits have been put in by both sides, but we cannot decide this question on affidavit evidence.

The case must be remitted to the lower Appellate Court for a finding whether an agreement was entered into on behalf of the third defendant by parties duly authorised by him in that behalf, and for good consideration, that the appeal against the decree which had been obtained by the plaintiff should be withdrawn.

Witnesses may be examined and the affidavits in reply filed in this Court may be received.

The finding should be submitted within 6 weeks, and 7 days will be allowed for filing objections.

In compliance with this order the Subordinate Judge sent findings to the effect that an agreement in writing to withdraw the appeal was entered into but that the agreement, being

unstamped, was not receivable in evidence and precluded all secondary evidence of such agreement.

This second appeal coming on for final hearing after the return of the finding of the lower Appellate Court, the Court made the following

ORDER.—Upon the finding of the Subordinate Judge that the compromise agreement was reduced to writing, and that the document was not stamped, we must accept his finding that the respondent failed to prove the agreement upon which he relied. We are not prepared to say that the admissions in the appellant's affidavit relieved the respondent from the obligation of proving the agreement which he set up.

The objection taken on behalf of the respondent that the appellant ought to have made the persons whom he made parties to his appeal to the lower Appellate Court parties to this appeal must, we think, be upheld We accordingly direct that this appeal stand over in order that these persons may be brought on the record as respondents.

Any question of limitation is reserved.

This second appeal coming on for final hearing after the addition of these persons as party respondents in compliance with the above order, the Court delivered the following

JUDGMENT.—The contentions raised on behalf of the appellant were, first, that the agreement come to in April 1899 and recorded in exhibits A and B was invalid as contravening the rules of the gramajenam, and, secondly, that the plaintiffs' claim was barred by limitation. As regards the first point, under paragraph 19 of the proceedings of the gramajenam of 1893 (exhibit I) the power of the committee to incur debts was restricted to the purposes mentioned in that paragraph. This restriction on the powers of the committee does not affect the powers of the whole body of members of the gramajenam. As regards paragraph 21 of the proceedings of 1893, the resolution recorded in exhibit B does not purport to cancel or modify any prescribed rule and is not inconsistent with any prescribed rule. The question is—are the resolutions contained in paragraph 6 of the proceedings of the meeting of April 1899 (exhibit B) and the "receipt" of the same date (exhibit A) binding on all the members? Paragraph 12 of exhibit I provides that a resolution of the members of the

gramajenam at a general meeting shall be binding on all the gramajenam. Exhibit B is a record of a resolution passed at a general meeting and signed by 25 of the gramajenam who were present at the general meeting. The Subordinate Judge found (paragraph 17) that the meeting was held after notice to all the villagers. True, it was not shown that, the meeting was convened by the secretary on a requisition of members as provided by resolution 12 of the proceedings of 1893, but the meeting was duly held after notice to members, and we are of opinion that the resolution passed at that meeting was binding on all the members, and that it did not contravene any of the rules of the gramajenam.

As regards the question of limitation it was contended on behalf of the appellant that what took place in April 1899 did not give the plaintiff an independent cause of action, and that, if it did, inasmuch as the second plaintiff was a necessary party and was not made a party till September 1903, the claim, in any view, was barred by limitation.

The general authority to bind all the members by a resolution passed at a general meeting in our opinion includes an authority to make an acknowledgment on their behalf and to enter into a fresh contract on their behalf. Assuming that an "account stated" cannot, as in England, be sued on as a fresh contract (see *Shankar* v. *Mukta*(1)) an account stated, which is signed by the defendant or his duly authorised agent gives a substantive cause of action (see *Amuthu* v. *Muthayya*(2)). The resolution in our opinion is something more than an agreement to give time. It is an agreement under which the defendants accept the accuracy of the accounts and agree to pay the debt in certain instalments with interest, the defendants not being liable to pay interest on the original debt. We are of opinion that the resolution constitutes a fresh contract binding on all the members, and that if the first plaintiff was entitled to sue alone, the suit was in time. In the view we take that the resolution constituted a fresh contract the point taken on behalf of the appellant that if the resolution was to be regarded as an acknowledgment for the purposes of section 19 of the Limitation Act, the suit was still out of time, does not arise. As regards the point whether the plaintiff was entitled

(1) (1898) I.L.R., 22 Bom., 513.
(2) (1893) I.L.R., 16 Mad., 339.

to sue without making his brother, the second plaintiff, a party, the first plaintiff admitted in his evidence that he and his brother were undivided, that the brother used to help him in his business and that the amount advanced was from their trade funds. The Subordinate Judge found that the plaintiff was the manager of the joint family (though he is not so described in the plaint), that the second plaintiff acquiesced in the suit being brought in the name of the first plaintiff alone, and that as the fresh contract was with the plaintiff himself, and did not show that the money was due to the family, the plaintiff was entitled to sue alone, and the suit was not time-barred. The Subordinate Judge relied on the decisions in *Ramanujachariar* v. *Sreenivasachariar*(1) and *Adaikkalam Chetti* v. *Marimuthu*(2).

In view of the state of the authorities this question is one of some difficulty. Subject to the question of acquiescence by the second plaintiff in the present case, the case *Alagappa Chetti* v. *Vellian Chetti*(3) would seem to be a clear authority for holding that the second plaintiff was a necessary party to the suit and that the suit was time-barred. This case was followed in *Angamuthu Pillai* v. *Kolandavelu Pillai*(4) where there was no evidence that the undivided brother acquiesced in the institution of the suit. The same view was taken in the recent case of *Shamrathi Singh* v. *Kishan Prasad*(5) where the authorities were reviewed and the view there taken is supported by the passages from Mr. Mayne's book on Hindu Law which are cited in the judgment in the Allahabad case. The cases of *Ramanujachariar* v. *Srinivasachariar* (1) and *Adaikkalam Chetti* v. *Marimuthu*(2) (are authorities the other way. We do not think the present case can be distinguished from the cases in which it has been held that the undivided member was a necessary party to the suit on the ground suggested on behalf of the respondent, viz., that though the moneys may have been advanced in the first instance out of family funds and on behalf of the family, the fresh contract was made with the first plaintiff in his own name and for his own benefit. The fresh contract was made for the purpose of discharging the original liability, and, if the family were entitled to the benefit of the

(1) (1899) 9 M.L.J., 103.
(2) (1899) I.L.R., 22 Mad., 326.
(3) (1895) I.L.R., 18 Mad., 33.
(4) (1900) I.L.R., 23 Mad., 190.
(5) (1907) I.L.R., 29 All., 311.

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discharge of the original liability, they are entitled to the benefit of the payment in discharge of the fresh contract. The balance of authority appears to be in favour of the view that the second plaintiff was a necessary party and that the suit is time-barred. We are not prepared to hold that the defect of the non-joinder of the second plaintiff is cured by the fact that he acquiesced in the bringing of the suit in the name of the first plaintiff alone.

The point was taken on behalf of the respondent that, in any view, the suit was not time-barred as regards the third instalment.

Under article 75 of the second schedule to the Limitation Act time begins to run, in the case of an instrument like the one in question in the present case, from the first default unless where the payee waives the benefit of the provision and then when fresh default is made in respect of which there is no waiver.

It appears to be well settled that mere abstinence from suing does not amount to waiver (see *Sethu* v. *Nayna*(1) *Gopala* v. *Paramma*(2) and *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty*(3)). An acceptance of an overdue instalment may be evidence of a waiver (see *Nagappa* v. *Ismail*(4) *Kashiram* v. *Pandu*(5)) *Jadab Chandra Bakshi* v. *Bhairab Chandra Chuckerbutty*(3) but it is not suggested in the present case that any instalment was paid. All that the plaintiff could rely on was the evidence that in his (the plaintiff's) books he credited the defendants in connection with this debt with certain moneys which the plaintiff had received. It is not shown that the credits were in respect of the first instalment, or that the fact of these sums being credited was communicated to the defendants. This being so we must hold there was no evidence of waiver and that the suit was barred by limitation.

On this ground the appeal must be allowed and the suit dismissed with costs throughout.

(1) (1884) I.L.R., 7 Mad., 577.
(2) (1884) I.L.R., 7 Mad., 583.
(3) (1904) I.L.R., 31 Calc., 297.
(4) (1889) I.L.R., 12 Mad., 192.
(5) (1903) I.L.R., 27 Bom., 1.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice and Mr. Justice Miller.

SRI RUNGACHARIAR AND OTHERS (PLAINTIFFS NOS. 1, 2, 4, 5, 6, 7 AND 8), APPELLANTS IN BOTH SECOND APPEALS,

v.

RUNGASAMI RATTACHAR AND ANOTHER (DEFENDANTS NOS. 5 AND 6), RESPONDENTS IN SECOND APPEALS No. 360 OF 1905.

SABAPATHI PILLAI AND OTHERS (DEFENDANTS NOS. 1 TO 4), RESPONDENTS IN SECOND APPEALS No. 361 OF 1905.*

1908. October 30. November 3 10. December 2.

Civil Courts, jurisdiction of—Mandatory injunction when not asked for not to be granted—Suit for honors when sustainable—Decree must declare the honor to which plaintiff is entitled.

Civil Courts have jurisdiction to entertain a suit for honors, if they are claimed as attached inseparably to an office as part of its emoluments and not simply accorded to its holder as marks of respect which might be extended to any person to whom the same decree of respect is due.

In declaring that the plaintiff is entitled to honors the decree must declare the specific honors to which the plaintiff is entitled. A general declaration that the plaintiff is entitled to the honors appropriate to the office will not suffice, but the Court must, to protect the plaintiff in the enjoyment of the office, declare what is the honor to which he is entitled.

The declaration need not set out honours, the right to which has not been questioned.

The *first thirtham* is not itself an office, but an honour forming the emoluments of an office.

A mandatory injunction ought not to be granted when it is not asked in the plaint.

SECOND appeals against the decree of F. D. P. Oldfield, District Judge of Tanjore, in Appeal Suit Nos. 483 and 574 of 1904 presented against the decree of S. Ramaswami Aiyar, District Munsif of Mayavaram, in Original Suit No. 310 of 1902.

This was a suit for a declaration that the plaintiffs had a hereditary miras right to the offices of *Sthalathar*, *Kutumba First Thirtham*, *Muntrapushpam*, *Vedaparayanam* and *Adyapakam* from time immemorial in the Temple of *Sri Parimala Ranganathaswami* at Tiruvilandur, and, by virtue of such right, were entitled to a fourth share of the honours and emoluments due to their offices as detailed in schedule A of the plaint. The plaintiff prayed for a permanent injunction directing the defendants Nos. 1 to 4 and

* Second Appeal Nos. 360 and 361 of 1905.

their representatives to accord to the members of the plaintiffs' family inclusive of themselves, and to their representative the said honours and emoluments as usual, and to restrain the defendants Nos. 5 and 6 from interfering with the enjoyment of such honors and emoluments by the plaintiffs, etc.; for recovery of Rs. 32-14-0 for loss of emoluments and Rs. 120 for loss of honor as detailed in schedule B of the plaint, and the costs of this suit, from the defendants, and for such other relief as to the Court may seem fit.

The Court of first instance passed a decree the material portions of which were as follows :—

It is declared as follows: (1) That the plaintiffs are the hereditary Sthalathars, 1st Thirthamdars of the Sri Parimala Ranganathaswami temple at Tiruvilandur.

Correct as per order on M.P. No. 555, dated 16th June 1904.

(2) That as such, they are entitled to the offices of *Muntrapushpam*, *Vedaparayanam* and *Adyapakam* in the said temple of *Sri Parimala Ranganathaswami*.

(3) That as holding the above offices, they are entitled to the honours and emoluments detailed in schedule A of exhibit B, the Razinama decree in Original Suit No. 468 of S 1900 on the file of this Court as modified by schedule C thereof.

* * * *

And it is decreed as follows. That the plaintiffs be entitled to the injunction prayed for, viz. :—

(*a*) That the defendants, the trustees and the archakas of the said temple, be and they hereby are restrained permanently, from interfering with any of the plaintiff's rights above.

(*b*) That defendants Nos. 1 to 4, the trustees of the said temple, be and they hereby are, directed permanently to see that the honours and emoluments due to the plaintiffs are accorded to them.

(*c*) That the defendants Nos. 5 and 6, the archakas of the said temple, be and they hereby directed permanently, to show plaintiffs all proper honours appertaining to their offices above.

On appeal the decree was modified by the District Court.

The material portion of the Appellate decree was as follows :—

"The substitution of a declaration that plaintiffs are entitled to the honours appropriate to the offices, which the lower Court has declared that they hold *Mantrapushpam*, *Vedavinnappam* and *Adyapakam* in the temple of Sri Parimala Ranganathaswami at Tiruvilandur for one that they are entitled to the honours as detailed in schedule A of exhibit B as modified by Schedule C (2) by *comion* of the declaration contained in the words that they are entitled to the first thirtham in all places except the Iravadi water to be taken in the Cauvery by the *archaka* while the *Goshti* is in the *Mantapam*, that they are entitled to the first *thirtham* there, that the plaintiffs are entitled to the first Viniyogam or dole of food and pulses (after the Swathanthrams are laid aside) in all places except at the *Thiruvanthikappu* when the *archaka* takes it behind the screen, at the *Thiruppalliyezhuchi* in the mornings when Vishwaksena comes out, at the Paramapadavasal in the Adyana Utchavam or ten nights feast at the Alwar Sannadhi apart form the Thirthagars and in the street processions; by substituting for the injunction granted against fifth and sixth defendants by the lower Court, one restraining them from interfering with plaintiffs' rights as now declared."

Plaintiffs Nos. 1, 2, and 4 to 8, appealed to the High Court.

Respondents Nos. 1 and 2 (defendants Nos. 5 and 6) filed in memoranda of objections.

R. Sadagopachariar, *T. Rangachariar* and *T. Narasimha Ayyangar* for appellants in both.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for respondents in Second Appeals No. 360 of 1905.

The Honourable the Advocate-General and *S. Rajagopala Ayyangar* for respondents in Second Appeals No. 361 of 1905.

Second Appeal No. 361 *of* 1905.

JUDGMENT.—It will be well to consider first the memorandum of objections argued by the Advocate-General on behalf of the trustees. It is therein contended that the whole suit ought to have been dismissed on the ground that the Civil Court has no jurisdiction to determine the questions raised in it.

The plaint however showed a cause of action. It alleged that the defendants "wrongfully obstructed the plaintiffs from their performing, as usual, the services that should be done by them and from receiving the emoluments and honours." It is true that the trustees, for whom the Advocate-General appears, did, in a qualified way, admit in their written statement that most of the

offices claimed by the plaintiffs were vested in them, but the archakas, the fifth and sixth defendants, denied this altogether and thus questions arose which required determination by the Civil Court in a proceeding to which the trustees were proper parties. It is clear that the suit was at any rate in part triable by the Civil Courts and that most of the declarations made by the District Munsif and the District Judge were required to protect the rights of the plaintiffs. The objection is principally to the declaration of the plaintiff's right to the position of "first thirthamdars," a position which it is urged is not that of a holder of an office. It was however not denied in the argument before us that the position of "first thirtham," whatever it be, is held hereditarily by the plaintiffs' family; and that being so, there is no sufficient reason to suppose that this declaration can do any harm to the trustees. It is further contended in the memorandum of objections that the District Munsif, whose decree the District Judge has left undisturbed in this particular, was wrong in awarding to the plaintiffs the emoluments withheld from them for some time. The argument is that as the District Munsif finds that one of the plaintiffs was guilty of misconduct, the plaintiffs must show that this is not so, or cannot recover the emoluments. There are obvious answers to this contention. There is, in the first place, no reason shown why all the plaintiffs should be made to suffer for the misconduct of some only of their number. It is for the defendants to show why that should be, and they have not shown it; and again it is not for the Court in the first instance, at any rate, to assess the penalty to be attached to a particular transgression. The punishment is according to the District Munsif, to be awarded by the trustees, and this finding was not, we think, contested by the Advocate-General. It is also found that the trustees did not assess the penalty but that in fact one alone of them did so, and that he had no power to do so; this finding again was hardly disputed; the District Judge says nothing on this point, and it is not perhaps going too far to infer that the question was not pressed by the trustees before him, though it is raised in their appeal to him. However that be, it is not possible to hold that the District Munsif was wrong in declining to accept as a proper punishment for the misconduct of the fourth plaintiff the penalty illegally imposed by the second defendant.

The memorandum of objections therefore fails except as to the mandatory injunction against the trustees which perhaps was left in the decree by inadvertence. In paragraph 3 of his judgment the District Judge seems to overlook it, but however that be, it is not contended before us that it ought to remain in the decree: it must be struck out.

The second appeal by the plaintiffs against the trustees, viz., Second Appeal No. 361 of 1905, can best be decided along with Second Appeal No. 360 of 1905, their second appeal against the archakas, fifth and sixth defendants.

Second Appeals Nos. 360 *and* 361 *of* 1905.

The District Judge has modified the decree of the District Munsif by expunging a mandatory injunction against the archakas, and that part of the decree which sets out, or refers in detail to, the honours to which the plaintiffs are entitled; and he has also reversed the decree for damages for loss of dignity.

The principal question is whether the Civil Courts can by their decree restrain the defendants from refusing to the plaintiffs some of the honours to which the District Munsif has found them entitled. The District Judge has correctly laid down the law when he says "a suit will lie for honours, if they are claimed as attached inseparably to an office as part of its emoluments, and not simply accorded to its holder as marks of respect, which might be extended to any other person to whom the same degree of respect is due."

The District Judge seems to take it as a fact conceded or a fact beyond question that the "first *thirtham*" is an office: he states that the defendants had before him formally withdrawn from their original position that the plaintiffs are not the "first *thirthams*" or entitled to their emoluments and dignities. He may have been inaccurate in saying that the appeal petition contained no ground directed against this part of the lower Court's adverse decision (paragraph 6 of his judgment), but there is no reason to suppose that he was wrong in saying that the defendants did not attempt to argue the question. They have not done so here; the trustees have not denied the plaintiffs' position as "first *thirthams*," and Mr. Ramachandra Aiyar for the archakas seemed to attribute the allegations in the written statement of his clients to a desire to make the best of the case by denying all the

plaintiffs' averments, true or false. He did not seek to disturb the finding on this point.

But it has been strongly urged here that the "first *thirtham*" is not an office but represents only honours accorded to the plaintiffs' family as persons of consideration and not because they hold a hereditary office in the temple. There is no discussion of this question by the District Judge; he speaks in paragraph 7 of "an office such as that of first *thirtham*" and seems, as we have said, to take it for granted that there is such an office and that the appropriate honours are attached to it by way of emoluments. This seems to follow from the fact that he has made a declaration in the decree.

The District Munsif's observations on the question are not perhaps altogether clear. He holds (at page 32 of the printed pleadings) that "the *sthalam* right and *thirtham* rights appertain to certain *offices* in the temple and that those that employ them are office-holders in the temple . . . . It (the evidence) also shows that by virtue of such offices the holders thereof are entitled to the *Manthrapushpam*, *Vedaparayanam* and *Adyapakam* rights in the temple," and further down, "there is sufficient evidence to show that the office-holders have to perform certain duties."

He then proceeds to find that there are four offices: (1) *stalam* and *first thirtham*, (2) *Manthrapushpam*, (3) *Vedaparayanam*, and (4) *Adyapakam*, and deals with them *seriatim*.

In discussing No. (1) he styles it "the *sthalam right* which carries with it the privilege of the *first thirtham*" and in discussing it he does not suggest that any duty is attached to the "privilege of the *first thirtham*" as such.

He next discusses the "Manthrapushpam duty," and this he assigns to the *thirthagar* and finds that "the thirthagars as such have to recite some *Vedas*, *Mantras*, *Puranas*, *Ithihasas*, *Prabandams* and *Mangalasutrams* at the *Manthrapushpam time*" (page 38 of the printed pleadings). In discussing the *Vedaparayanam* he does not mention the *thirthagars* "as such" but attributes to the "plaintiffs" certain duties, and he does not discuss *Adkyapakam* in detail. His conclusion is that the *sthalam*, *first thirtham*, *Vedaparayanam*, *Mantrapushpam*, and *Adyapaka* rights are in the nature of claims to an office, and the plaintiffs are such office-holders bound to perform certain duties, and remunerated by substantial emoluments and privilege (page 40 of the

printed pleadings). The conclusion seems to us to be this: the plaintiff as hereditary Sthalathars are bound to perform, besides the duties of superintendence attached to their office of Sthalathar, the ceremonial duties of vedaparayanam, etc., and are entitled to receive renumeration for the performance of those duties. Included in this remuneration is "the privilege of first thirtham" from which the plaintiffs are called '*thirthakars*'. That this is the District Munsif's conclusion may also be gathered from his observations in paragraph 19 of his judgment at page 43 of the printed pleadings. It is also substantially what is alleged in the plaint. This conclusion is, we think, accepted by the District Judge. It is involved in his statement that there was no contention before him that the plaintiffs are not the 'first *thirthams*' or entitled to their emoluments and dignities (paragraph 6 of the printed pleadings). The only contentions before him were (1) that the honours appropriate to the first *thirtham* being conceded, the Civil Court has no jurisdiction to decide in what those honours consist, or (2) if it has jurisdiction the honours claimed are not appropriate. The answer to the first question is that if honour is attached to an office by way of remuneration, the Civil Court has jurisdiction, and the answer to the second is to be found by the determination of a question of fact with which the District Judge deals though in his view it was unnecessary to do so.

The District Judge declines to set out in his decree the specific honours comprising the privilege of the first *thirtham*, but he makes a declaration that the plaintiffs are entitled to the honours appropriate to the offices they hold. His view seems to be that though he can declare the nature of the honours generally or specifically, he cannot go further and decide how those honours are to be accorded (paragraph 7, page 105 of the printed pleadings). And later on he states the principle to be that ceremonial episodes such as those under discussion have a dual character, under one aspect the honours accorded to the claimant being emphasised, and under the others their ritual significance, and the Court will exercise control when the importance of the former predominates and the latter can be neglected or is not in dispute (page 106 of the printed pleadings).

Here, as the District Munsif has said, (page 43 of the printed pleadings) it is the precedence which constitutes the honour; the right to receive the *thirtham* is not in question. If then the Court

is to declare the plaintiffs' right to the honour, it seems to follow that it must declare the order of precedence. Taking the findings to be, as we do, that the privilege of the first *thirtham* is attached to the hereditary office of the plaintiffs as a part of the remuneration of the office, the Court must, to protect the plaintiffs in the enjoyment of the office, declare what is the honour to which they are entitled. This is in accord with the decisions in this Court even if we accept the Advocate-General's contention that to entitle them to the protection of the Court, plaintiffs must have something to do, for which the honour is a reward. Here there is a hereditary office involving duties of different kinds, secular and religious, all inseparable from the office, and remunerated in various ways one of which is by the honour in question.

In *Srinivasa Thathachariar* v. *Srinivasa Aiyangar* and *Srinivasa Chariar* v. *Srinivasa Thathachariar*(1) the learned Judges did not find it necessary to declare the ritual in order to preserve to the claimant the enjoyment of his office; had it been necessary it is clear from the judgments that they would have done it.

As to the other findings of fact, we cannot accept Mr. Ranga Chariar's contention that the burden of proof has been improperly thrown by the District Judge on the plaintiffs. The words 'first *thirtham*' are not free from ambiguity and it is for the plaintiffs to show what they mean, what is the right which they claim, and that they are entitled to it.

Nor can we accede to the contention that because in the view of the District Judge a decision on some of the issues was unnecessary, his findings upon those issues can be held to be no findings. He has, we think, fully considered all the evidence bearing on the questions of the *thirtham*, and he finds that the plaintiffs have failed to show that the archakas are not entitled to take the thirtham before the conclusion of the *puja* and while they are behind the screen. That finding we accept, but it does not dispose of the case, because it is found by the District Munsif that in the instance complained of the *thirtham* was taken by the archakas in the presence of the assembly when the *puja* was concluded and as we suppose the screen removed, at any rate not behind the screen. Before the District Judge, however, the archakas did not claim this right and it is therefore not necessary

(1) (1899) 9 M.L.J., 355.

to call for a finding: the decree may declare the right of the plaintiffs to take the *thirtham* first after the close of the *puja* when the archakas come out from or are no longer behind the screen.

In reality the evidence of the Shastras and the other evidence as to the right of the archakas to take the *thirtham* during the *puja* is not relevant to the present issue. The plaintiffs' right of the first *thirtham* must mean as the District Munsif finds, the right to the first *thirtham* after the close of the *puja* by the burning of the camphor light. Whether the archakars are entitled before the light is burned and during the progress of the *puja* to take the *thirtham* behind the screen concerns the plaintiffs, only in the same way that it concerns other members of the community, that is to say, in so far as they are affected as worshippers by any deviation from or perversion of the ancient rituals. That however is not a matter with which the Court is concerned.

As to the *Viniyogam*, the plaint alleges only one instance in which the plaintiffs' rights were obstructed and that occasion, in the *Alwar Sannadhi*, is an occasion on which according to the District Munsif's finding, the archakas are entitled to precedence, because there is no *swathanthram* (line 5, page 69 of the printed pleadings). The plaintiffs say in the plaint that ever since that occasion they have taken no *prasadham*. There is therefore only one occasion on which it is alleged that the defendants had an opportunity of infringing their rights and as it is found that they were not on that occasion infringed, there is no proof that their rights in regard to *viniyogam* have ever been infringed or threatened by the defendants. This being so, the declaration as to *viniyogam* would seem unnecessary, and the District Judge's modification of the decree may be accepted so far as that is concerned.

As to damages, the District Munsif believes that the archakas did, on the occasion which has given rise to the suit, infringe the plaintiffs' right by taking the *thirtham* first and that may possibly have lowered the plaintiffs in the eyes of the assembly: he awarded compensation of one rupee on this account. The District Judge has not found whether it is a fact that the archakas took the *thirtham* before the plaintiffs after the close of the *puja*, *i.e.*, in front of the screen, but it is certainly not desirable that the case should be remitted for a finding on so

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unimportant and trivial a matter as the right of the plaintiffs to nominal damages for a problematical loss of dignity.

The matter really in dispute is as to the precedence of the plaintiffs as thirthagars at the *Thiruventhikappu* ceremony, and it is unnecessary in our opinion to set out in the decree other occasions on which they are entitled to honours, which so far as the plaint shows have not been denied to them before the suit. It is sufficient as regards other matters to declare them entitled to their emoluments and honours to meet the general denial by the archakas in their written statement. We therefore modify the decree as follows :—

For paragraph 3 of the decree (on page 16 of the printed pleadings) we substitute the following :—

"That as holding the above offices they are entitled to the honours and emoluments appropriate thereto including the right to first thirtham at the Thiruventhikappu when the archakas are no longer behind the screen."

The mandatory injunction, paragraph 7 (*b*), will also have to be struck out, and in other respects the decree of the District Judge is confirmed.

Each party will bear his own costs of the Second Appeals and the memorandum of objections in this Court.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Sankaran-Nair.

1908. July 23. November 18. December 8.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL, REPRESENTED BY THE COLLECTOR OF ANANTAPUR (DEFENDANT), APPELLANT,

v.

BUNDEPPA OF KONAKONDLA (PLAINTIFF), RESPONDENT.*

Darkhast, grant of land on—Grant by competent authority not to be set aside because not made in the manner prescribed.

A grant of land on darkhast, by an authority competent to make such grant, cannot, where no fraud has been practised in obtaining such grant, be set aside on the ground that it was not made in the manner prescribed by the Board's Standing Order.

Collector of Salem v. *Rengappa*, [(1889) I.L.R., 12 Mad., 404 at p. 406] followed.

* Second Appeal No. 679 of 1907.

MUNRO AND SANKARAN-NAIR, JJ.

THE SECRETARY OF STATE FOR INDIA v. BUNDEPPA OF KONAKONDLA.

SECOND APPEAL against the decree of M. J. Murphy, District Judge of Kurnool, in Appeal Suit Nos. 143 and 144 of 1905, presented against the decree of K. Krishnamachariar, District Munsif of Gooty, in Original Suit No. 802 of 1904.

The facts of the case for the purpose of this report are sufficiently stated in the judgment.

The Government Pleader for appellant.

P. R. Sundara Ayyar and *P. S. Parthasarathi Ayyangar* for respondent.

JUDGMENT.—In this case certain tank bed lands were granted on darkhast to the plaintiff's father in 1894 and patta was issued. This grant was in contravention of the Board's Standing Order No. 15, which lays down that tank bed lands are to be dealt with under Board's Standing Order No. 16. Under the latter order tank bed lands are to be divided into plots and sold by auction. In 1904 the Collector cancelled the patta on the ground that the plaintiff's father had obtained the land by fraud. The plaintiff then brought the present suit to have his patta confirmed. The defendant, the Secretary of State for India, in his written statement, alleged that the assignment of the land on patta was in contravention of Board's Standing Order No. 15 ; that the plaintiff's father obtained his patta by fraud and collusion with the village officers ; and that, as the assignment of the land had been obtained by fraud and misrepresentation, it was illegal and not binding upon the defendant. It seems clear that the defendant's case in the written statement was that the grant was liable to be set aside, not because it was irregular, but because it had been brought about by fraud. The District Judge has found that there was no fraud and this finding of fact is binding upon us, and is really sufficient for the disposal of the case. It is however argued that the defendant meant to contend that he was entitled to cancel the grant because it was opposed to Board's Standing Order No. 15. Assuming this to be so, we are of opinion that the grant is not liable to be cancelled. The disposal of tank bed lands is not prohibited. All the rules lay down is, that tank bed lands shall be disposed of in a particular manner. It is also conceded that a

MUNRO AND SANKARAN-NAIR, JJ.

THE SECRETARY OF STATE FOR INDIA v. BUNDEPPA OF KONAKONDLA.

Tahsildar—it was, a Tahsildar who granted the darkhast in the present case—has power to dispose of tank bed lands. The position then is this. The Tahsildar having power to dispose of the lands in suit disposed of them in a manner not warranted by the rules, whether owing to a mistake as to the nature of the lands, or owing to a misapprehension of the rules. There is no question of any fraud. In due course patta was issued to the grantee of the lands There is no suggestion that the patta was issued conditionally. In *Collector of Salem* v. *Rangappa*(1) it was observed as follows :—" It is not pretended that the patta issued " to the plaintiff was issued conditionally or that it was issued by " an officer not competent to act in the matter. Nor is it alleged " in the written statement that there was any fraud practised by " the plaintiff on the defendant or the Collector. The case was " simply one of mistake ; the Tahsildar would not have issued " the patta had he known all the facts. In our opinion allegation " and proof of such mistake does not justify the cancelment of a " patta issued by a competent officer in favour of one who has " come into occupation of the land under it. When once posses- " sion has been taken under a patta unconditionally issued by a " competent officer the pattadar, can, we think, be evicted only " under the provisions of the Revenue Act." The same principle is followed in *Periaroyalu Reddi* v. *Royalu Reddi*(2). Following these decisions we are of opinion that the Collector was not justified in cancelling the patta in the present case. The appeal is dismissed with costs.

(1) (1889) I.L.R., 12 Mad., 404 at p. 406. (2) (1895) I.L.R., 18 Mad., 434.

APPELLATE CRIMINAL.

Before Mr. Justice Munro and Mr. Justice Sankaran-Nair.

EMPEROR

v.

CHOTA SINGH.*

1908. December 14, 22.

Prisons Act IX of 1894, s. 52—Presidency Magistrate not a District Magistrate or Magistrate of the first class within s. 52 of the Act.

A Presidency Magistrate is not a District Magistrate or Magistrate of the first class within the meaning of section 52 of the Prisons Act and he has no jurisdiction to try prisoners for offences under that section.

APPEAL under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused by Mir Sultan Mohidin, Presidency Magistrate, Egmore, Madras, in Calendar Case No. 7361 of 1908.

The facts are sufficiently set out in the judgment.

Nugent Grant, the Acting Crown Prosecutor, for appellant.

V. N. Kuppu Rao for accused.

JUDGMENT.—One Chota Singh was tried by a Presidency Magistrate for an offence under section 52 of the Prisons Act IX of 1894 and was acquitted. Against the acquittal the present appeal has been filed by Government. Objection is taken on behalf of Chota Singh that the Presidency Magistrate had no jurisdiction to try the offence.

Under section 52 of the Prisons Act, prisoners guilty of certain offences may be forwarded by the Superintendent to the Court of the District Magistrate or of any Magistrate of the first class having jurisdiction. No specific mention of Presidency Magistrates is made, and the question is whether either of the terms " District Magistrates " or " Magistrate of the first class" includes a Presidency Magistrate for the purpose of the Prisons Act. The terms " Magistrate, " " District Magistrate, " and " Magistrate of the first class " are not defined in the Prisons Act, and in the General Clauses Act the only one of these three terms defined is " Magistrate, " which is said to include all persons exercising all or any of the powers of a Magistrate under the Code of Criminal

* Criminal Appeal No. 617 of 1908.

Procedure. The term "Magistrate" occurs in sections 42 and 54 of the Prisons Act and must be interpreted according to the definition in the General Clauses Act. The terms "District Magistrate" and "Magistrate of the first class," not being defined in the General Clauses Act, must, in accordance with the recognised rules of interpretation, be given their ordinary meanings unless, as is not the case, there is something in the Prisons Act itself to indicate the contrary. The ordinary meanings of the terms are undoubtedly those to be gathered from the Code of Criminal Procedure. Sections 10 and 12 of the Code show that District Magistrates and Magistrates of the first class are appointed only in districts outside the Presidency towns. It is thus clear that ordinarily a Presidency Magistrate would not be included in the terms "District Magistrate" and "Magistrate of the first class." Section 11 (2) of the Prisons Act provides that the Superintendent of a Prison other than a central prison or a *prison situated in a Presidency town* shall obey certain orders given by the District Magistrate. The term is manifestly used in the section quoted in the meaning of the Code of Criminal Procedure, and, in the absence of anything to the contrary, must be similarly construed in other sections of the Act. Many instances can be cited in which the Legislature has insisted on the difference between a Presidency Magistrate and a District Magistrate or Magistrate of the first class. Thus, in the Lepers Act III of 1898, it was considered necessary in section 2 (5) to define "District Magistrate" as including a Chief Presidency Magistrate thereby showing that "District Magistrate" does not ordinarily include "Presidency Magistrate." Sections 8 and 10 of the same Act confer certain powers on Presidency Magistrates or Magistrates of the first class. In section 3 of the Income-tax Act II of 1886, "Magistrate is defined as meaning a Presidency Magistrate or a Magistrate of the first or second class. Section 71 of the Stamp Act II of 1899 lays down that no Magistrate other than a Presidency Magistrate or a Magistrate whose powers are not less than those of a Magistrate of the second class shall try any offence under the Act. In section 3 of Opium Act "Magistrate" is defined as meaning in the Presidency town a Presidency Magistrate and elsewhere a Magistrate of the first class, or when specially empowered a Magistrate of the second class. Reference may also be made to section 4 of the Indian Volunteers Act XX of 1869 for a similar distinction.

Finally it may be pointed out that the first proviso to section 52 of the Prisons Act lays down that the District Magistrate may transfer a case for enquiry and trial to any Magistrate of the first class. We must take it, in the absence of anything to the contrary, that the term "Magistrate of the first class" has the same meaning in the proviso as in the body of the section. If therefore we interpret "Magistrate of the first class" as including a Presidency Magistrate, a District Magistrate must be held empowered to transfer cases to a Presidency Magistrate. Ordinarily a District Magistrate has power to transfer cases only to some Magistrate subordinate to him—*vide* section 192 of the Code of Criminal Procedure and cannot therefore transfer a case to a Presidency Magistrate or to any other Magistrate outside his own districts. We think the power of transfer given by the proviso to section 52 of the Prisons Act must be read subject to the limitation imposed by the Criminal Procedure Code.

We therefore find that the Presidency Magistrate had no power to try Chota Singh. We set aside his acquittal and direct that he be discharged as the proceedings before the Presidency Magistrate were void.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Miller and Mr. Justice Abdur Rahim.

GAVARANGA SAHU (PLAINTIFF), PETITIONER

v.

BOTOKRISHNA PATRO AND OTHERS (DEFENDANTS AND HIS LEGAL REPRESENTATIVES), RESPONDENTS.*

1908. November 5, 10, 25. 1909. March 9.

Limitation Act, XV of 1877, s. 4—Civil Procedure Code, Act XIV of 1882, s. 54 (b)—Plaint, though not sufficiently stamped is 'plaint' within the meaning of s. 4, of the Limitation Act—Suit not barred when plaint insufficiently stamped is presented within period of limitation, though stamp deficiency made good after such period.

When a plaint is presented on a paper insufficiently stamped within the prescribed period of limitation, and time is given by the Court under section 54 (*b*) of the Code of Civil Procedure to make good the deficiency and

* Civil Revision Petition No. 446 of 1906.

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the deficiency is supplied within the time fixed by the Court, but after the period of limitation expired, the suit is not barred by limitation.

The validity of a plaint for the purposes of section 4 of the Limitation Act is not dependent on its validity for the purposes of the Court Fees Act.

Venkatramayya v. *Krishnayya*, [(1897) I.L.R., 20 Mad., 319], dissented from.

Jainti Prasad v. *Bachu Singh*, [(1893) I.L.R., 15 All., 65], dissented from.

Dictum of Sir S. SUBRAHMANIA AYYAR in *Assan* v. *Pathumma*, [(1899) I.L.R., 22 Mad., 494], approved and followed.

PETITION, under section 25 of Act IX of 1887, praying the High Court to revise the judgment and decree of V. Runga Row, District Munsif of Berhampur, in Small Cause Suit No. 208 of 1906.

The Civil Revision Petition first came on for hearing before Miller, J., who made the following order of reference to the Full Bench:

ORDER OF REFERENCE.—In this case the plaint was presented on the last day of the limitation period. The suit was not undervalued, but the Court fee affixed to the plaint was insufficient. Time was allowed by the Court under section 54 (*b*) of the Code of Civil Procedure, and the deficiency was duly made good. The plaint was filed and the suit heard and dismissed as barred by limitation on the authority of *Venkatramayya* v. *Krishnayya*(1).

In *Surendra Kumar Basu* v. *Kunja Behary Singh*(2), a case on all fours with the present, Banerji, J., distinguishes *Venkatramayya* v. *Krishnayya*(1) on the ground that in that case the plaint was returned to be represented to the Court and was not retained in the Court. I venture with deference to doubt the reality of the distinction. It would no doubt be real if the plaint had been rejected on presentation: the document subsequently presented would then have been a new plaint: but clearly the learned Judges did not deal with the case on that footing; Shephard, J., at page 321 of the report states expressly that the case is the one provided for in section 54 (*b*) of the Civil Procedure Code; and the opening sentences of his judgment show that the plaint was not rejected. If then that case was rightly decided, I think the decision of the District Munsif in the present case must be upheld. But that case was dissented from by Sir Subrahmania Ayyar, J., in *Assan* v. *Pathumma*(3). Sir James Davies, J., who took part in both cases distinguishes them on the ground that in the latter case

(1) (1897) I.L.R., 20 Mad., 319. (2) (1900) I.L.R., 27 Calc., 814.
(3) (1899) I.L.R., 22 Mad., 494.

WHITE, C.J., MILLER AND ABDUR RAHIM, JJ.

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there was a mistake by the Court, and adheres to the decision in the earlier case; he states that he could support that decision by additional reasons, but as he did not deem it necessary to decide the question in his view of the case, we have unfortunately to proceed without the assistance of those arguments.

On the strength of his view of the case I am asked to hold that Sir Subrahmania Ayyar's opinion was unnecessary for the decision of the case and need not be followed: but clearly that was not the view of the learned Judge himself. In his view, as he explains at page 501 of the report, "The present cases cannot be distinguished from *Venkatramayya* v. *Krishnayya*(1), cited for the appellants and they should be held to be barred by limitation if that decision is to be followed." I think therefore I am bound to attach to his observations all the weight that is due to any opinion which he found it necessary to express in order to dispose of the case before him.

That opinion was followed in *Dhondiram* v. *Taba Savadan*(2), when Sir Lawrence Jenkins, C.J., refers to it as supported by cogent reasoning: *Venkatramayya* v. *Krishnayya*(1), was not there referred to, but I cannot suppose that it was not considered as *Assan* v. *Pathumma*(3), deals with it; at any rate Sir Lawrence Jenkins, C.J., notices section 28 of the Court Fees Act, on which the decision of Shephard, J., is largely based. This case in Bombay is on all fours with the present case as is also *Moti Sahu* v. *Chhatri Das*(4), in which the same decision was arrived at, and the reasoning there is adopted by Sir Francis Maclean, C.J., in *Surendra Kumar Basu* v. *Kunja Behary Singh*(5). In *Yakut un Nissa Bibee* v. *Kishoree Mohun Roy*(6), the decision seems to be the other way, but Banerji, J., who took part in all three cases distinguishes *Yakut un Nissa Bibee* v. *Kishoree Mohun Roy*(6), as dependent on the special circumstances of the case. In *Huri Mohun Chuckerbutti* v. *Naim ud din Mahomed*(7), Petheram, C.J., and Ghose, J., followed *Moti Sahu* v. *Chhatri Das*(4).

In our own Court I do not find a case on the point since *Assan* v. *Pathumma*(3), but the cases cited by Sir Subrahmania Ayyar, J., in that case, *Papamma Rao* v. *Sitaramayya*(8), as well

(1) (1897) I.L.R., 20 Mad., 319. (2) (1903) I.L.R., 27 Bom., 330.
(3) (1899) I.L.R., 22 Mad., 494. (4) (1892) I.L.R., 19 Calc., 780.
(5) (1900) I.L.R., 27 Calc., 814. (6) (1892) I.L.R., 19 Calc., 747.
(7) (1893) I.L.R., 20 Calc., 41. (8) Appeal No. 159 of 1893 (unreported).

as *Chennappa* v. *Raghunatha*(1) and *Patcha Saheb* v. *Sub-Collector of North Arcot*(2), to all of which Parker, J., was a party, support the view which has been adopted in Bombay and Calcutta.

As regards Allahabad the decision of the Full Bench in *Balkaran Rai* v. *Gobind Nath Tiwari*(3), was dissented from in *Chennappa* v. *Raghunatha*(1) to which I have referred, but was followed in *Jainti Prasad* v. *Bachu Singh*(4), where the two cases in *Moti Sahu* v. *Chhatri Das and Yakut un Nissa Bibee* v. *Kishoree Mohun Roy*(5) are held to be in conflict. In *Durga Singh* v. *Bisheshar Dayal*(6), Sir John Stanley, C.J., and Burkitt, J., without expressing their individual opinion felt bound to follow the earlier cases but in a later case *Hari Ram* v. *Akbar Husain*(7), *Balkaran Rai* v. *Gobind Nath Tiwari*(3), is much criticised in the judgment of Knox, A.C.J. Though he accepted and distinguished *Jainti Prasad* v. *Bachu Singh*(4), Banerji, J., did not find it necessary to express his opinion on *Jainti Prasad* v. *Bachu Singh*(4).

The Allahabad Court still seems to hold that unless there is mistake or inadvertence on the part of the Court, the plaint cannot be validated as from its date of presentation, for none of the Judges has dissented from *Jainti Prasad* v. *Bachu Singh*(4), and Sir George Knox, A.C.J., distinguishes it on the ground that there the mistake was discovered before the plaint was registered.

The same learned Judge, however, at pp. 759 and 760 of the report in *Hari Ram* v. *Akbar Husain*(7), expresses a view practically identical with that of Sir Subrahmania Ayyar, J., in *Assan* v. *Pathumma*(8): he declines to read the Court Fees Act and the Limitation Act together, and further holds that even if that must be done, he will not be justified in reading the word 'plaint' in section 4 of the Limitation Act as meaning a plaint upon which the proper Court fee has been paid.

As regards the authorities then, support is found in all the High Courts for the view of Sir Subrahmania Ayyar, J., upon the question, and the cases in Bombay and Calcutta except perhaps

(1) (1892) I.L.R., 15 Mad., 29.
(2) (1892) I.L.R., 15 Mad., 78.
(3) (1890) I.L.R., 12 All., 129.
(4) (1893) I.L.R., 15 All., 65.
(5) (1892) I.L.R., 19 Calc., 780 and 747.
(6) (1902) I.L.R., 24 All., 220.
(7) (1907) I.L.R., 29 All., 749.
(8) (1899) I.L.R., 22 Mad., 494.

Surendra Kumar Basu v. *Kunja Behary Singh*(1) which seems to proceed to some extent on the second paragraph of section 28 of the Court Fees Act, go as far as he would go.

The whole question seems to depend on the meaning to be attributed to the word "plaint" in section 4 of the Limitation Act; if the insufficiently stamped plaint is a plaint within the meaning of that section it follows that whether the insufficiency is due to mistake or not, the document when presented will be useful to save the bar of limitation. Of course if every insufficiently stamped plaint received by an officer of the Court is to be presumed to have been received by mistake or inadvertence, the question will not arise: the second paragraph of section 28 of the Court Fees Act will validate the document as from the date of its presentation, but the remarks of Sir George Knox, A.C.J., and Banerji, J., on this subject (*Hari Ram* v. *Akbar Husain*(2)), seem to confine the presumption to plaints which have been admitted and registered, and I do not see how it is to be properly extended to cases in which the officer of the Court has merely taken the document from the hand of the person presenting it, and put it on one side for further examination before admission.

And this is what frequently, perhaps usually, happens. The officer of the Court has not time to scrutinize each plaint as soon as it is presented; he takes it and as soon as he has time examines it, and if it is insufficiently stamped he does not at once reject it under section 54 of the Code of Civil Procedure (*Hari Ram* v. *Akbar Husain*(2)); but applies section 54 (*b*) and fixes a time for making good the deficiency. This course is clearly warranted by the section; but it can hardly be said that taking without examination is taking by inadvertence or mistake.

In such cases, and the present is, I think, one of them, the question which I have propounded does require an answer, and I agree with Sir Subrahmania Ayyar, J., that the validity of the plaint for the purposes of section 4 of the Limitation Act is not dependent on its validity for the purposes of the Court Fees Act.

It seems to me that a document purporting to be a plaint and drawn up substantially in accordance with the provisions of sections 48 to 52, Code of Civil Procedure, is a plaint whether it is

(1) (1900) I.L.R., 27 Calc., 814.
(2) (1907) I.L.R., 29 All., 749 at pp. 762 and 767.

stamped or not. It is clear that it does not cease to be a plaint; because it is not drawn up exactly in accordance with those provisions, *vide* section 53 (*b*) (i) and (ii) : it is a plaint, but an imperfect plaint. So it seems to me, if it is not sufficiently stamped it is a plaint but an imperfect plaint. So far as civil suits are concerned the plaint of the Limitation Act and the Court Fees Act must be the plaint prescribed by the Code of Civil Procedure for the institution of a suit. There is nothing else that it can mean. Then the plaint imperfect by reason of being insufficiently stamped has no validity by virtue of section 28 of the Court Fees Act for the purposes of that Act. Now as was observed by Mahmood, J., in *Balkaran Rai* v. *Gobind Nath Tiwari*(1) the Court Fees Act has no preamble whereby its purposes can be ascertained, but I do not think it can be suggested that one of its purposes was to supplement the provisions of the Limitation Act. One of its main purposes, no doubt, is to levy fees for services to be rendered by Courts and public officers, and the plaint is not to be effectual for such purposes until it is duly stamped. The Court will not be empowered to issue process for the defendant, or to try the suit or grant relief to the plaintiff, but, if it does any of these things by mistake or inadvertence, its proceedings can be validated by payment of the required fees in the way prescribed by law. To hold with Shephard, J., that an insufficiently stamped plaint being *ab initio* void cannot be validated seems to me, with great deference, to be running counter to section 28 of the Court Fees Act and to section 54 (*b*) of the Code of Civil Procedure. In neither case, as I read these sections, can it be held that the plaint when the deficiency is supplied is a new plaint.

In my opinion sufficient extent is given to the word "validity" in section 28 if it is confined to the purposes of the Act in which it is found, and I therefore agree with Sir Subrahmania Ayyar, J., and the observation of Sir George Knox, A.C.J., to which I have referred.

I do not overlook the danger adverted to in *Jainti Prasad* v. *Bachu Singh*(2) where the observations of the learned Judges at pages 73 and 74 of the report conjure up a picture of a District Munsif's Head Clerk dispensing to belated and impecunious plaintiffs what would amount to extension of limitation periods

(1) (1890) I.L.R., 12 All., 129.

(2) (1893) I.L.R., 15 All., 65.

up to one, ten, or twenty years; but I cannot but think that had the framers of the Code of Civil Procedure had this danger in mind they would have provided against it expressly in the Code, and I cannot therefore accept the existence of the danger as evidence of any value in favour of the view of the law taken in *Venkatramayya* v. *Krishnayya*(1). I do not say that the danger is unreal, but it can be minimized if not extinguished in various ways, one of which would be by fixing a maximum period of time under section 54 (*b*) of the Code of Civil Procedure or rather hereafter under Order VII, rule 11, of the new Code of Civil Procedure; and after all if the officer of the Court is disposed to misconduct, it is not difficult to admit an insufficiently stamped plaint by an alleged mistake or inadvertence and file it, in which case the plaintiff also obtains in effect an extension of the limitation period within which to present a fully stamped plaint.

As I am unable to distinguish *Venkatramayya* v. *Krishnayya*(1) on the ground suggested by Banerji, J., in *Surendra Kumar Basu* v. *Kunja Behary Singh*(2), and as opinions in this Court are as I have shown conflicting, I will ask the Chief Justice to refer to a Full Bench the question.

"When a plaint is presented on a paper insufficiently stamped, "within the prescribed period of limitation, and time is given by "the Court under section 54 (*b*) of the Code of Civil Procedure to "make good the deficiency, is the suit barred by limitation, if the "deficiency is supplied within the time fixed by the Court, but after "the limitation period has expired ?"

The case again came on for hearing in due course before the Full Bench constituted as above, when the Court expressed the following opinion :—

T. V. Narayaniah for petitioner.

S. Ranganadha Ayyar for second and third respondents.

OPINION.—We agree with the view taken in the order of reference and with the reasons upon which it is based. Section 149 of the Code of Civil Procedure, 1908, is in accordance with this view.

We answer the question which has been referred to us in the negative.

(1) (1897) I.L.R., 20 Mad., 319.

(2) (1900) I.L.R., 27 Calc., 814.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Miller.

1908. December 14, 16.

SRINIVASA PILLAI, RECEIVER OF KATTUR ESTATE, AND ANOTHER (PLAINTIFF AND SUPPLEMENTAL APPELLANT), APPELLANTS,

v.

VASUDEVA MUDALIAR AND OTHERS (DEFENDANTS), RESPONDENTS.*

Limitation Act, IX of 1908, ss. 1, 31—Section 31 applies to appeal pending before High Court on remand by the Privy Council.

A suit on a mortgage was instituted within sixty years of the date when the money became payable and the appellate decree of the High Court decreeing the claim in such suit was reversed by the Privy Council and the case remanded before the Limitation Act of 1908 came into force. The appeal was pending disposal on such remand in the High Court when the said Act came into operation:

Held, that the case fell within the latter part of section 1 of the Act and that the plaintiff was entitled to the benefit of section 31 of the Act.

APPEAL against the decree of K. Ramachendra Ayyar, Subordinate Judge of Negapatam, in Original Suit No. 48 of 1899.

SUIT to recover amount due on a mortgage executed in 1883. The suit was instituted in 1902. The Court of First Instance passed a decree in favour of the plaintiff and the High Court confirmed the decree on 13th March 1905 holding that the period of limitation was sixty years. On appeal it was decided by the Privy Council on 22nd July 1907 that the period of limitation was twelve years and the case was remanded to the High Court and remained undisposed of on 7th August 1908 when the Limitation Act of 1908 was passed and came into force.

When the case came on for disposal, it was contended that the plaintiff was not entitled to the benefit of the Limitation Act of 1908.

The Hon. Mr. *V. Krishnaswami Ayyar* and *T. V. Gopalasami Mudaliar* for appellants.

T. Richmond for first respondent.

P. R. Sundra Ayyar and *V. Ryru Nambiar* for first to third respondents.

* Appeal No. 164 of 1902.

BENSON AND MILLER, JJ.

SRINIVASA PILLAI v. VASUDEVA MUDALIAR.

JUDGMENT.—On the 13th March 1905 this Court gave judgment for the plaintiff for the amount due under the mortgage on which the suit was brought, on the footing that the period of limitation applicable was sixty years under article 147 of the second schedule of the Limitation Act of 1877.

This view was in accordance with a series of previous decisions as to the scope of articles 147 and 132.

On appeal, however, by the defendant to the Privy Council, Their Lordships declared that, on the true construction of the Limitation Act, the article applicable was No. 132, and they remitted the case to this Court to be disposed of in accordance with this declaration (*Vasudeva Mudaliar* v. *Srinivasa Pillai*(1)).

If nothing further had occurred it would now be necessary for us to reopen the appeal on the footing that the twelve years' rule of limitation in article 132 was primarily applicable, and we should have to consider the plaintiff's pleas that by reason of acknowledgments and so forth his claim was not barred even under that rule. But in the meantime the legislature intervened. The declaration of the Privy Council was made on the 22nd July 1907, and while the case so remitted was pending in this Court the legislature on the 7th August 1908 passed the Indian Limitation Act, 1908.

Section 1 of that Act directs that section 31 shall come into force at once, and section 31 enacts:—"(1) Notwithstanding anything contained in this Act or in the Indian Limitation Act, 1877, in the territories mentioned in the second schedule a suit for foreclosure or a suit for sale by a mortgagee may be instituted within two years from the date of the passing of this Act, or within sixty years from the date when the money secured by the mortgage became due, whichever period expires first, and no such suit in the said territories instituted within the said period of sixty years and pending at the date of the passing of this Act, either in a Court of First Instance or of Appeal, shall be dismissed on the ground that a twelve years' rule of limitation is applicable."

The plaintiff contends that the latter part of this clause is applicable to the present case. We are of opinion that the contention is valid. The suit is one in the territories mentioned in the second schedule of the Act: it was instituted within sixty years from the date when the money secured by the mortgage became

(1) (1907) I.L.R., 30 Mad., 426.

BENSON AND MILLER, JJ.

SRINIVASA PILLAI v. VASUDEVA MUDALIAR.

due: and it was pending in this Court as a Court of Appeal at the date when the Act was passed. We cannot therefore dismiss the suit (in whole or in part) on the ground that a twelve years' limitation is applicable.

We are unable to accede to the defendant's contention that section 31 of the Act does not apply to the present case. The object of the legislature was to alleviate the hardship that would otherwise have resulted to mortgagees in consequence of the period of limitation being declared to be only twelve years instead of sixty, which was the period which had previously been authoritatively declared by this Court to be applicable in suits of the kind. We find nothing in the words of the Act or in the intention of the legislature, to justify us in excluding the plaintiff from the benefit of section 31. That being so, the plaintiff's claim must be dealt with on the footing that it is not barred by limitation.

This is the footing on which it has been dealt with in our former judgment of the 13th March 1905. The defendant desires to reopen the matters decided in that judgment, but we do not think that he should be allowed to do so. Their Lordships have expressed no opinion on any of the matters decided in that judgment, and we see no reason why the defendant should be allowed to reopen them. It therefore only remains for us to reaffirm that judgment in principle. But the defendant obtained a stay of execution pending disposal of his appeal and the plaintiff now asks us to fix a new date for payment of the amount due and grant the plaintiff a decree for the amount due with interest at the contract rate of $10\frac{1}{2}$ per cent. with annual rests up to the date so fixed. The defendant opposes this but we think the plaintiff is within his rights in claiming it. The defendant does not require any further time for payment. We therefore fix to-day as the date for payment of the amount due calculated as above, and affirm the decree in other respects.

With regard to costs, the plaintiff's claim was valid in accordance with the law as declared by the High Court until the decision of the Privy Council declared the law to be otherwise. We therefore think the plaintiff should have his costs prior to the Privy Council appeal. Costs before the Privy Council have been awarded to the defendant, and we think that the parties may each be left to bear their own costs in this Court subsequent to the decree of the Privy Council.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Munro.

MOORIYAT PEETIKAYIL KUNHAMINA AND OTHERS (DEFENDANTS NOS. 1 TO 3), APPELLANTS,

v.

MOORIYAT PEETIKAYIL KUNHAMBI AND OTHERS (PLAINTIFFS NOS. 1 TO 7), RESPONDENTS.*

1908. December 7, 16.

Marumakattayam Law—Validity of gift, excluding male issue, to wife and daughter—Right of last surviving daughter—Construction of gift.

A person, governed by the Marumakattayam Law, executed a deed of gift in favour of his wife and three daughters under which they and their female descendants were to enjoy the properties hereditarily, males being excluded. The last surviving daughter made a gift of the properties to her own female descendants. In a suit by the female descendants of another daughter:

Held, (1) that the condition excluding males was invalid.

(2) That the wife and daughters did not, on the construction of the deed, take as joint tenants in the English sense, so as to vest the whole property in the last survivor, or as tenants in common.

(3) That the deed created a sort of Thavazi which was not different from an ordinary Thavazi in respect of descent so long as there remained any female descendant of any of the donees.

(4) That the last surviving daughter had no interest which she could validly convey.

SECOND APPEAL presented against the decree of R. D. Broadfoot, District Judge of North Malabar, in Appeal Suit No. 551 of 1905, presented against the decree of T. V. Venkateswara Ayyar, District Munsif of Kuttuparamba, in Original Suit No. 636 of 1904.

Suit for a declaration that a deed of gift executed in favour of defendants Nos. 1 to 5 by their deceased grandmother B was invalid.

The properties in suit belonged to one V, who, in 1877, executed a deed of gift of them in favour of his wife P and her three daughters A, B and *V*. A died without issue, *V* died next leaving daughters and granddaughter who were the plaintiffs. B died last leaving female descendants, defendants Nos. 1 to 5. Prior to her death B executed a deed of gift of the plaint properties to the defendants Nos. 1 to 5. The plaintiffs sued to have the

* Second Appeal No. 797 of 1906.

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deed of gift by B declared invalid and to recover possession of the properties.

The Court of First Instance gave a decree for plaintiffs and this was confirmed on appeal.

The defendants Nos. 1 to 3 preferred a second appeal to the High Court.

J. L. Rosario for appellants.

Dr. *S. Swaminadhan* for *T. Richmond* for respondents.

JUDGMENT.—The gift by Mammi (exhibit A) under which items 1 to 4 were held by Biyyathumma is a gift to his wife and his three surviving daughters to be enjoyed by them and their female descendants hereditarily, males being excluded.

It was not contended on either side that the condition of enjoyment can stand so far as it excludes males altogether, and the gift must therefore be taken as a gift, without that condition, to Kunhipathamma and her three daughters.

Biyyathumma having survived her mother and sisters the question is now whether she had a right to give the property to her own descendants or whether the plaintiffs, who are descendants of one of her sisters Uppennu, have joint rights in it and the gift is consequently bad and must be set aside.

It is contended on the one hand that the property became the absolute property of Biyyathumma as the survivor of the four donees or if the donees held as tenants in common, the gift cannot be set aside, because Biyyathumma was competent to transfer her own interest.

On the other hand, it is contended that the donees must be taken to hold the property with the ordinary incidents of tarwad property and that Biyyathumma had no interest which she could transfer to her descendants. To this it is replied that the intention of the donor must be looked to to determine the incidents of the property held under the gift, and that here the donor's intention was clearly not to give the property with the incidents of tarwad property but to create a perpetual succession confined to females, a course of devolution equally unknown to the Marumakkatayam and to the Muhammadan law, though from the District Judge's judgment it seems that attempts to create a similar course are not unknown in Malabar.

The intention of the donor was, beyond any doubt, to provide for his wife and daughters and their female descendants; his

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attempt to carry into effect this intention fails, so far as the attempt is to effect the exclusion of males altogether, but that does not affect the intention. There is nothing to indicate any intention to exclude the female descendants of any of the donees in any event and we should be doing that which the donor never intended, were we to decide that the descendants of one daughter are excluded by the death of their ancestor before her sisters—and we have the authority of the Privy Council for declining to presume a gift creating a joint tenancy in the English sense (*Jogeswar Narain Deo* v. *Ramachandra Dutt*(1)). Here the donees are followers of Marumakkatayam usage and the gift is, but for one condition, an ordinary gift from a husband to his wife and her descendants, such as we find commonly in Malabar Tarwads; the one unusual condition is the exclusion of males from the enjoyment, but that is not a condition of any real importance: the inclusion or exclusion of males makes no difference to the devolution of the property; unless there is a partition or it happens that the last surviving member of the group is a male, the difference is only in the number of mouths to be fed. It seems therefore to us that the lower Courts have taken the right view of the gift; it was intended to create a "sort of tavazhi" as the District Judge puts it, and a tavazhi not differing in regard to the course of descent from an ordinary tavazhi so long as there remained any female descendant of any of the donees.

We find it easier to attribute this intention to the donor than to believe that he intended the donees to take as tenants in common, the share of each to descend to the female descendants respectively of each. If it had been his intention to give each a share exclusively, we think he would have probably given separate plots to each donee.

We cannot, in our opinion, simply because the donor attached to the gift a condition of enjoyment to which effect cannot be given, infer that he intended to depart entirely from Marumakkatayam usage, seeing that, as we have already observed, the gift but for that condition is entirely in accord with that usage.

In this view of the case Biyyathumma had no interest in items 1 to 4, of the property given which she was competent to give away.

(1) (1896) I.L.R., 23 Calc., 670.

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Items 5 to 7 which were the acquisitions of Kunhi Pathumma descended at her death, if the decisions are right, to her tarwad. The karnavan has not claimed them and they have been held by Biyyathumma. But the District Munsif finds, and the District Judge does not differ, that she held them for the tavazhi. There is nothing to suggest, he says, that she held them adversely to the plaintiffs, and there is evidence that she maintained the plaintiffs. If then the karnavan has lost his rights it is the tavazhi not Biyyathumma alone that has acquired them.

In our opinion the decision of the Courts below is right and we dismiss the appeal with costs.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

1908. November 18.

JAMMALAMADAKA SUBBA LAKSHMAMMA (PLAINTIFF), APPELLANT,

v.

JAMMALA VENKATARAYADU AND OTHERS (DEFENDANTS, NOS. 2 TO 8, 10 TO 25, 27, 31, 28 TO 30), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, *ss.* 582, 591—*An order of remand on appeal cannot be reviewed by same Court subsequently—An order of remand not appealed against cannot be objected to in second appeal from the final appellate decree.*

A decree was reversed on appeal and the case was remanded for retrial. Against the decree passed at the remanded trial, an appeal was preferred and the Judge of the Appellate Court, who was the successor of the Judge who originally remanded the case, held that the previous order of remand was wrong, and allowed the appeal:

Held, on Second Appeal, that the original order of remand could not be reviewed by the lower Appellate Court, and could not be questioned on the second appeal under section 591 of the Code of Civil Procedure as such order was not appealed against.

SECOND APPEAL presented against the decree of S. P. Rice, District Judge of Guntur, in Appeal Suit No. 15 of 1906, presented against the decree of M. Viswanatha Ayyar, District Munsif of Guntur, in Original Suit No. 289 of 1901.

* Second Appeal No. 669 of 1906.

WHITE, C.J. AND ABDUR RAHIM, J.

SUBBA LAKSHMAMMA v. VENKATA-RAYADU.

The facts for the purpose of this report are sufficiently stated in the judgment.

The Hon. the Advocate-General for appellants.

The Hon. Mr. *V. Krishnaswami Ayyar* and *K. Subrahmania Sastri* for first to twenty-third respondents.

P. Narayanamurthi for twenty-fourth respondent.

JUDGMENT.—The facts which give rise to this appeal are these. The plaintiff brought a suit for specific performance of a contract of sale of land and for possession of the land. The District Munsif gave him a decree for specific performance but dismissed his claim for possession. This decree was affirmed on appeal by the Subordinate Judge. The plaintiff then brought a fresh suit for possession. The Munsif held his claim was *res judicata*. The District Judge (Mr. Venugopaul Chetty) held it was not and remanded the case for disposal on the merits. The defendant did not appeal against this order. The Munsif then gave the plaintiff a decree for possession. The defendant appealed against this decree. Mr. Venugopaul Chetty had been succeeded as District Judge by Mr. Rice. Mr. Rice took the view that the plaintiff's claim for possession was *res judicata*. He held that the order of remand was wrong, allowed the appeal and dismissed the suit. We are unable to agree with the District Judge that it was open to him to review the order of remand which had been made by Mr. Venugopaul Chetty. The question of law is not affected by the fact that Mr. Venugopaul Chetty had been succeeded by Mr. Rice. If the defendant is right it would have been open to Mr. Venugopaul Chetty on the appeal against the decree for possession given by the Munsif to the plaintiff to review his own order.

The question as it seems to us turns on the meaning of the word "decree" in section 591 of the Code of Civil Procedure. We think it should be construed as meaning a decree passed by the Court which made the order which is alleged to be erroneous, defective or irregular. If the word decree is to be construed quite generally as the defendant has contended it should be, the effect would be to give a right of review which is not conferred in express terms and to cause great inconvenience in practice. The construction which we adopt is supported by authority (*see Suraj Din* v. *Chattar*(1), *Luleet Pandey* v. *Byjnath. Singh*(2),

(1) (1880-81) I.L.R., 3 All., 755. (2) (1870) 14 W.R., 285.

WHITE, C.J. AND ABDUR RAHIM, J.

SURBA LAKSHMAMMA v. VENKATA-RAYADU.

Kharag Prasad Bhagat v. *Durdhari Rai*(1), *Brojo Soondur Gossamee* v. *Juggut Chunder Dey*(2), and *Balvant Ramachandra Natu* v. *The Secretary of State*(3)).

It was contended that it was open to us in second appeal to go into the question as to whether the remand order made by Mr. Venugopaul Chetty was right. In our opinion section 591 of the Code of Civil Procedure does not empower us to do this.

We must set aside the decree of the lower Appellate Court and remand the case for disposal on the merits. Costs will abide the event.

APPELLATE CIVIL.

Before Mr. Justice Sankaran-Nair and Mr. Justice Pinhey.

1908, November 30, December 1.

SRINIVASA REDDI (FIRST DEFENDANT), APPELLANT,

v.

SIVARAMA REDDI (PLAINTIFF), RESPONDENT.*

Specific Relief Act I of 1877, ss. 15, 17—Sec. 15 does not apply where undivided father, without concurrence of his sons, agrees to sell—Decree in such cases in suit for specific performance against the father and son.

An undivided father has an interest in, and under certain circumstances a power of disposal over, every portion of the undivided property. Section 15 of the Specific Relief Act will not apply where an undivided father contracts to sell undivided property without the concurrence of his undivided son.

Where such an agreement is sought to be enforced in a suit in which the father and son are joined as defendants, the proper decree to be passed is one directing the sale by the father of the entire property on payment of the whole consideration, without determining whether the sale will be binding on the son, and not one directing the father to sell his one half share on payment of one half of the purchase money.

Kosuri Ramaraju v. *Ivalury Ramalingam* [(1903) I.L.R., 26 Mad., 74], followed.

SECOND APPEAL presented against the decree of F. H. Hamnett, District Judge of South Arcot, in Appeal Suit No. 79 of 1905, presented against the decree of V. S. Narayana Aiyar, District Munsiff of Villupuram, in Original Suit No. 22 of 1904.

Suit to compel the defendants to execute in favour of plaintiff a registered deed of sale conveying the plaint properties for Rs. 135.

(1) (1892) I.L.R., 14 All., 348.
(2) (1874) 21 W.R., 199.
(3) (1908) I.L.R., 32 Bom., 482.
* Second Appeal No. 249 of 1906.

SANKARAN-NAIR AND PINHEY, JJ.

SRINIVASA REDDI v. SIVARAMA REDDI.

The first defendant was the undivided father of the second. The plaintiff's case was that first defendant as managing member made an agreement to sell the suit lands to plaintiff for Rs. 135, and that second defendant subsequently ratified the contract.

The Court of first instance found that the second defendant was not bound by the contract and passed a decree directing the first defendant to execute in favour of plaintiff a sale-deed of his one half share on receipt of a moiety of Rs. 135.

This decree was confirmed on appeal.

The first defendant appealed to the High Court.

R. Kuppuswami Ayyar for appellant.

T. Rangachariar for respondent.

JUDGMENT.—The suit was for specific performance of a contract for the sale of land. The plaint alleges that the first defendant, as the managing member of a family consisting of himself and his son, the second defendant, entered into a contract to sell the land to the plaintiff and agreed to obtain the consent of his son to the sale and to induce him to join in the execution of the deed of conveyance. Accordingly he placed the plaintiff in possession of the land. The plaint also alleges subsequent ratification by the second defendant.

It is found that the second defendant had not authorized the first defendant to enter into the contract and that he has not ratified it. The suit against him was rightly dismissed.

The lower Courts have however passed a decree directing the first defendant to sell his share, *i.e.*, half the land on payment to him of half the purchase money. The first defendant appeals against this decree.

Under section 17 of the Specific Relief Act, the Court shall not direct the specific performance of a part of a contract except in cases coming under one or other of the three last preceding sections, and it is the appellant's contention that under section 15 the plaintiff, is entitled to obtain a decree for half the land only on payment of the entire purchase money. If he is unwilling to pay it, the suit must be dismissed.

The case of *Kosuri Ramaraju* v. *Ivalury Ramalingam*(1) is on all fours with the present case. There, it was held by the learned judges that the plaintiff was clearly entitled to a

(1) (1903) I.L.R., 26 Mad., 74.

SANKARAN NAIR AND PINHEY, JJ.

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decree for specific performance against the first defendant therein, without determining whether the sale by him would or would not bind the interest of any other member of the family in the property agreed to be sold. It is urged by the pleader for the appellant that the effect of section 15 and illustrations (*a*) and (*b*) were not then considered and the ruling is opposed to that section. We do not agree with the appellant's contention. Section 15 would be applicable only if the first defendant had no interest in any portion of the property agreed to be conveyed as in illustration (*a*) or is unable to convey such portion as in illustration (*b*) to that section. In this case, it cannot be said that the first defendant is not interested in any portion of the land. He is entitled as managing member to convey it for certain purposes or the land may be allotted to him on partition between himself and his son and he has already put the plaintiff in possession of the entire property.

Following therefore the decision in *Kosuri Ramarayu* v. *Ivalury Ramalingam*(1) we direct the decree of the lower Court to be modified as therein by decreeing specific performance of the contract to sell the whole of the plaint land against the first defendant, without determining whether such sale would bind the second defendant. The respondent's pleader consents to this modification. The appellant will pay the respondent's costs.

The time is extended to 30 days from this date.

(1) (1908) I.L.R., 26 Mad., 74.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Miller.

RAGHAVALU CHETTY (SIXTH DEFENDANT), APPELLANT,

v.

ADINARAYANA CHETTY AND OTHERS (PLAINTIFFS NOS. 1 TO 5), RESPONDENTS.*

1908. December 15, 16.

Fraudulent transaction, rights of parties to—Relief given on grounds of public policy—User of fraudulent document by person, ignorant of its fraudulent nature does not estop such person—Pleadings, variation of, when allowable.

The rule of law, which allows a defendant to protect himself against an action by the plaintiff on a contract made or deed entered into between them by showing the illegal or immoral nature of the transaction, is based on grounds of public policy and the benefit that accrues thereby to the defendant is the inevitable result of the application of such rule and is not based on any right to which he is entitled.

The fact that the defendant had set up the transaction successfully as a shield against creditors will not be a bar to the application of this rule if the defendant, not being a party to the original transaction, was, at the time the transaction was so set up, a minor and had no knowledge of the real nature of the transaction.

A defendant, who had just attained majority, and who had, in ignorance and without proper legal advice, admitted the claim of the plaintiff, may, when the truth is discovered by him subsequently, be allowed to resile from his original plea.

THE Second Appeal against the decree of F. H. Hamnett, District Judge of Chingleput, in Appeal Suit No. 310 of 1904, presented against the decree of V. Swaminatha Ayyar, District Munsif of Poonamalle, in Original Suit No. 14 of 1904.

Suit to recover lands and damages for use and occupation.

The properties were sold by defendants Nos. 1 to 3 to E, the deceased father of sixth defendant and were sold to the plaintiff by E.

The defendants Nos. 1 to 5 impeached the sale by E as fraudulent. The sixth defendant originally admitted the plaintiff's claim, but when put into the witness box, he retracted his statement and alleged that the sale by E was collusive.

* Second Appeal No. 440 of 1906.

BENSON AND MILLER, JJ.

RAGHAVALU CHETTY v. ADINARAYANA CHETTY.

The District Munsif found on the evidence that the sale-deed by E to plaintiff was a transaction to defraud creditors and dismissed the suit.

On appeal the District Judge concurred in the finding but held that defendants Nos. 1 to 5 had no *locus standi* to impeach it, and the sixth defendant, having successfully set up the sale-deed on two occasions against attaching creditors, was precluded from setting up its true nature. He accordingly reversed the decree of the lower Court.

The sixth defendant appealed to the High Court.

T. R. Ramachandra Ayyar, *T. R. Krishnaswami Ayyar* and *T. Arumainatham* for appellant.

C. V. Anantakrishna Ayyar for first respondent.

JUDGMENT.—The District Judge has misunderstood the cases quoted by him. In the case of *Yaramati Krishnayya* v. *Chundru Papayya*(1) it is pointed out that "a defendant is allowed to show the turpitude of both himself and the plaintiff in order to protect himself against an action by the plaintiff to give effect to a contract or deed entered into for an illegal or immoral purpose. Here an exception is allowed not for the sake of the wrong doer, but on grounds of public policy, since the Court ought not to assist a plaintiff to recover property or enforce a contract in respect of which he has no true title or right. The rule of public policy cannot be applied without allowing the defendant to benefit by it. But the benefit is allowed him by accident as it were and not in order to secure him any right to which he is entitled (*Holman* v. *Johnson*(2)) *per* Lord Manifield and *Luckmidas Khimji* v. *Mulji Canji*(3). In the present case, too, the sixth defendant does not set up his own fraud but alleges that his father, when he (the sixth defendant) was a child, transferred the plaint property to the plaintiff without consideration and in order to use the transfer as a cloak against creditors. The Courts have found that this plea is proved and in our opinion on that finding the plaintiff's suit should have been dismissed. The plaintiff's pleader argues that the sixth defendant should not be allowed to defeat the operation of the deed as it was twice used in Court apparently with success, as a cloak against creditors; but the

(1) (1897) I.L.R., 20 Mad., 326.
(2) (1775) Cowp., 343.
(3) (1881) I.L.R., 5 Bom., 295.

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sixth defendant was then a minor, and there is nothing to show that he knew that the deed was without consideration and fraudulent. Indeed his original plea in this suit admitting the deed rather indicates that he had then no knowledge of its real character.

The plaintiff in this connection argues that the sixth defendant, having in his written statement admitted the plaintiff's claim, ought not to have been allowed to resile from that plea and allege that the deed was without consideration and fraudulent. The District Judge allowed the sixth defendant to alter his original plea, because he was satisfied that the original plea was made in ignorance and without proper legal advice, by the sixth defendant who had only recently ceased to be a minor. In these circumstances we think that the District Judge was right in allowing the sixth defendant to set up the true case, although it differed from his original plea. We observe that the District Judge gave the plaintiff the opportunity to adduce further evidence to rebut the defendant's new plea, but the plaintiff failed to show that it was not true.

We, therefore, reverse the decree of the District Judge and restore the decree of the District Munsif with costs in this and in the lower Appellate Court except the costs awarded to the plaintiff by the District Judge's order of the 10th April 1905.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

AMIRTHATHAMMAL (PLAINTIFF), APPELLANT,

v.

PERIASAMI PILLAI (DEFENDANT), RESPONDENT.*

1907. March 7. April 9. 1909. January 4, 11.

Consideration, absence of—Where deed purports to convey some title and is not intended to be a sham, and is known to the grantee and partially acted upon absence of consideration does not prevent passing of title.

A deed, executed for no consideration but which purported to convey title, and which was not intended by both the parties to be mere sham, will, if it is known to the grantee and is partially acted upon and if the grantor knew the

* Second Appeal No. 1293 of 1904.

WHITE, C.J. AND MILLER, J.

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nature of the transaction, operate to convey the title which it purports to convey and not merely what the grantor intended to convey.

Yaramati Krishnayya v. *Chundru Papayya*, [(1897), I.L.R., 20 Mad., 326], distinguished.

Ranga Ayyar v. *Srinivasa Iyengar*, [(1898) I.L.R., 21 Mad., 56], referred to.

Ramalinga Mudali v. *Ayyadorai Nainar*, [(1905) I.L.R., 28 Mad., 124], distinguished.

Cecil v. *Butcher*, [37 E.R., 744, at p. 749], referred to.

When relief will be given in the case of voluntary conveyances considered.

SECOND APPEAL against the decree of J. Hewetson, District Judge of Trichinopoly, in Appeal Suit No. 155 of 1903, presented against the decree of S. Doraiswami Aiyar, District Munsif of Trichinopoly, in Original Suit No. 182 of 1902.

T. R. Ramachandra Ayyar and *T. R. Krishnaswami Ayyar* for appellant.

T. Rama Ayyar for respondent.

JUDGMENT (Sir ARNOLD WHITE, C.J.).—This is a suit to recover possession of land. In 1897 the plaintiff, a Hindu widow, executed and registered a sale-deed of the land in question to her nephew. She retained possession of the deed but the nephew had notice of its execution and the tenant of the land in question attorned to him. The nephew died in 1901 and after his death, the plaintiff got the tenant to attorn to him. A few months later the nephew's mother and heir sold the land to the defendant.

The deed executed by the plaintiff purports to be an out and out sale to the nephew. The plaintiff states in her plaint that she executed the sale-deed with the object that the defendant (who is the nearest reversioner of the plaintiff's husband) should not obtain the property after her death. The District Judge finds that there was no consideration for the sale-deed by the plaintiff to the nephew. But that there was consideration for the sale by the nephew's mother to the defendant. He also finds that the plaintiff intended to give a title after her death though not in her life-time, in other words, that she only intended that the deed should be operative in the event of her nephew outliving her.

I think that the deed operated to convey to the nephew, the title which it purported to convey and that the plaintiff cannot be heard to say that she intended that title should not pass if the nephew predeceased her. If the parties intended title to pass, the fact that no consideration was paid, does not prevent title from

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passing *Chinnasami Reddiar* v. *Krishna Reddi*(1). It may be that the plaintiff when she executed the deed did not contemplate the contingency of her nephew predeceasing her, but this, of course, does not prevent the title passing. It seems to me that the present case is distinguishable from the class of cases of which *Yaramati Krishnayya* v. *Chundru Papayya*(2), is an example, where the Courts held that the transaction was a sham and it was not intended that any title should pass. Here the finding is that the plaintiff intended that *some* title should pass though not the title which the deed purported to convey. Applying the test laid down in *Ranga Ayyar* v. *Srinivasa Ayyangar*(3), I do not think it can be said that in the present case both parties had it in their minds that the deed should be a mere sham. *Ramalinga Mudali* v. *Ayyadorai Nainar*(4), seems to me to be clearly distinguishable from the present case. There the Court held that the sale-deed was inoperative on the ground that both parties intended that the transfer should be effected only on the marriage of the vendor to the vendee's daughter, and the marriage never took place.

The circumstances in which a Court of equity will decline to give relief upon (*i.e.*, will decline to treat as operative) a voluntary deed alleged to have been executed for a special purpose for which it was never required, are thus stated by Sir Thomas Plumer in *Cecil* v. *Butcher*(5). "I think there is a great preponderance of authority in support of the proposition, that in a case where a voluntary deed is made without the knowledge of the grantee when it is made for a special purpose for which it was never required to be made use of when it has been kept in the hands of the grantor without ever being acted on, a Court of equity will not relieve upon it." In the present case the sale-deed was not made without the knowledge of the grantee, and it was acted on by the plaintiff's tenant attorning to the party in whose favour the deed was executed. It may perhaps be said that the attornment would be consistent with the plaintiff's case, but the fact remains that the deed was acted on. In the case of *re Way's Trusts*(6), an unmarried woman made a voluntary assignment by deed of her reversionary interest under a settlement, the deed being

(1) 16 Mad., L.J., 147.
(2) (1897) I.L.R., 20 Mad., 326.
(3) (1898) I.L.R., 21 Mad., 56.
(4) (1905) I.L.R., 28 Mad., 124.
(5) 37 E.R., 744, at p. 749.
(6) 34 L.J.Ch., 49.

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irrevocable. The deed was duly executed, and attested, but it was not communicated either to the trustees of the settlement or to the trustees of the deed, or to any of the parties who were to take under it. The lady subsequently destroyed the deed and made a different disposition of the property by will. It was held that the assignor having done all that she could for transferring her interest, the assignment was effectual notwithstanding the absence of notice. At the same time leave was given to file a bill to set aside the deed on the ground that the irrevocable nature of the transaction had not been explained to the lady. The deed of sale in the case before us was executed with the knowledge of the grantee and it is not suggested that the plaintiff did not understand its purport.

I think the lower Appellate Court was right and I would dismiss this appeal with costs.

MILLER, J.—On the District Judge's finding we have in this case a voluntary deed in favour of Gopal Pillai executed by the plaintiff with the intention that the property to which it relates should not pass to the transferee before the death of the transferor. We have the fact that the deed was duly communicated to Gopal Pillai though retained by the plaintiff in her own custody and never delivered and that it was acted upon to this extent that the tenant in possession executed an agreement to pay rent to Gopal Pillai, though whether he actually paid rent to him or to the plaintiff is not found by the District Judge.

In these circumstances it is clearly not enough for the plaintiff to show that she did not intend a present transfer. Though the deed was without consideration she could not entitle herself to recall it by merely showing that *she* did not intend it to be operative.

It would be necessary for her to show that it was agreed between her and the transferee that the transfer should be revocable, or should be suspended or postponed until the happening of a given event.

The District Judge does not find the existence of such an agreement. Although the first issue does not expressly raise the question, and an agreement is not in the plaint expressly alleged, yet I think it may fairly be inferred from the averments in paragraph 4 of the plaint that the plaintiff's case was rested upon an agreement between herself and Gopal Pillai. I would call for a finding on the question whether such an agreement existed. If it did, I have no doubt the plaintiff ought to succeed as the defendant cannot, in the circumstances of the case, rely on want of notice or on section 41 of the Transfer of Property Act.

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The Chief Justice—I do not think this is a case in which a finding should be called for as it seems to me the plaintiff does not allege anything in the nature of an express agreement between the transferor and the transferee that the transfer should be revocable or should be contingent on the happening of a given event.

The result will be that the second appeal will be dismissed with costs.

There being a difference of opinion between the learned Judges whether a finding should be called for or not, an appeal under clause 15 of the Letters Patent was preferred by the plaintiff-appellant.

The Letters Patent appeal came on for hearing before Wallis, Munro and Sankaran-Nair, JJ., on Monday, the 4th and 11th day of January 1909, when the Court delivered the following judgment.

T. R. Krishnaswami Ayyar for appellant.

T. Rangachariar and *T. Natesa Ayyar* for respondent.

JUDGMENT.—We are of opinion that the question whether there was an oral agreement that the sale-deed (exhibit A), should not take effect until the plaintiff's death, and the further question whether such an oral agreement could be proved having regard to the terms of exhibit A do not arise, as no such agreement is pleaded. Under these circumstances we agree with the learned Chief Justice that no fresh finding is called for. Both the learned Judges have accepted the findings that exhibit A was not intended to be a mere sham and that it was even acted on to some extent.

There is no allegation that the plaintiff was induced by Gopal Pillai to execute exhibit A on the representation that he would hold the property for his benefit during his lifetime such as might warrant the Court in imposing a trust upon him and his representatives. Under these circumstances we think the second appeal must be dismissed with costs throughout.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sankaran-Nair.

1908. November 25. December 1.

SUBRAYA CHETTI AND ANOTHER (DEFENDANTS), APPELLANTS,

v.

RATHNAVELU CHETTI (PLAINTIFF), RESPONDENT.*

Civil Procedure Code, Act XIV of 1882, s. 43—Suit for possession, no bar to subsequent suit for arrears of rent.

A suit to eject a tenant holding under a lease is not a bar under section 43 of the Code of Civil Procedure to a subsequent suit to recover arrears of rent under the terms of the lease.

The claim for rent is a distinct cause of action from that for the recovery of possession—the former arising when the rent accrues due and the latter when the tenancy determines.

Section 43 requires only the joinder of claims arising out of the same cause of action and not claims arising out of any obligation created by the contract which creates the obligation on which the cause of action is based.

APPEAL under section 15 of the Letters Patent against the judgment of Boddam, J., in Civil Revision Petition No. 599 of 1907, presented to revise the decree of the District Munsif of Poonamalle in Small Cause Suit No. 649 of 1907.

The defendant executed a registered rental agreement to plaintiff on 12th September 1900 in respect of a house promising to pay every month a rent of Rs. 1-8-0 and to vacate the house on one month's notice.

In 1906 the plaintiff sued for possession of the house and obtained a decree.

The present suit was for rent for six years from the date of tenancy, *i.e.*, September 1900. The District Munsif dismissed the suit as barred by section 43 of Civil Procedure Code. On revision, this judgment was reversed and the plaintiff's claim was allowed by the Hon'ble Mr. Justice Boddam.

The material portion of the judgment on revision is as follows:—

"I think this decree is wrong. The plaintiff sued the defendants for possession in Original Suit No. 412 of 1906 on the

* Letters Patent Appeal No. 23 of 1908.

file of the District Munsif's Court of Poonamallee, alleging that the defendants' tenancy had been determined by a notice to quit which had expired. In that suit he did not make any claim for rent or for mesne profits. He now sues for the rent due by the defendants under the lease and the Munsif has held that his claim is barred by section 43, Civil Procedure Code. The former suit was not a suit under the lease. The plaintiff's cause of action was for ejectment and possession on the ground that the defendants were in wrongful possession. The suit was in tort. His present suit is for breach of contract to pay a certain rent under the contract of lease and is a suit in contract. It cannot be said that his present claim is a claim he was entitled to make in respect of his former cause of action. A claim in contract cannot arise out of a cause of action which is for tort and his suit was therefore not barred by section 43, Civil Procedure Code. I reverse the decree of the District Munsif and decree the plaintiff's claim with costs throughout."

Against this judgment, the defendants preferred an appeal under clause 15 of the Letters Patent.

M. A. Tirunarayana Chariar for appellants.

T. V. Muthukrishna Ayyar for *V. Masilamani Pillai* for respondent.

JUDGMENT.—The property in suit is a house let on an agreement under which the tenants undertook to vacate the premises on a month's notice. The notice was duly given but the tenants did not surrender, the landlord sued for possession and obtained a decree; he now sues for arrears of rent due under the lease.

The question for decision is whether the suit is barred by section 43 of the Code of Civil Procedure, whether, that is, the claim for rent is a part of the claim which the plaintiff was entitled to make in respect of the cause of action on which he founded his suit for possession.

Let it be granted for the purposes of this judgment that the appellants are right in contending that the claim for rent and the claim for possession are both claims arising out of, or founded on obligations created by, the agreement, that is to say, that the learned Judge was in error in holding that the foundation of the earlier action was tort and of the later contract. That does not conclude the question, for it remains to be seen whether both claims are claims in respect of the cause of action for ejectment.

MILLER AND SANKARAN-NAIR, JJ.

SUBRAYA CHETTI v. RATHNAVELU CHETTI.

It is clear that the causes of action in both suits are not the same. The cause of action for any portion of the rent is complete when that part of the rent is due and is unpaid: the cause of action for recovery of the property does not arise until the tenancy is determined,—the one is founded on the obligation to pay for the occupation of the premises, the other on an obligation to withdraw from occupation.

The whole claim which the plaintiff is entitled to make in respect of the latter cause of action seems to be a claim to be put in possession of the property. He is entitled, no doubt, to join in the same action claims for rent and damages (section 44 (*a*) and (*b*)), but those claims are parts of separate causes of action and are not parts of the claim in respect of the cause of action for recovery of possession. They are unconnected with the obligation to surrender. In *Venkoba* v. *Subbanna*(1) the learned Judges draw attention to the change made by the latter codes as compared with Act VIII of 1859, and explain the law as it now stands to require the plaintiff to include in his suit "not only the claim arising out of that cause of action, but also any other claim founded on the same cause of action and enforcible at the date of the former suit." It is to be inferred that a claim "in respect of" a cause of action is a claim "founded on" that cause of action, and the difference between a claim "founded on" a cause of action and a claim "arising out of" a cause of action, seems to be more a difference of metaphor than a difference in the quality of the claim.

To read the phrase "in respect of the cause of action" as we are asked on behalf of the appellants to read it, that is to say, as equivalent to "arising out of any obligation created by the contract which creates the obligation on which the cause of action is based" would be, we think, to extend its meaning further than the language will properly go and might conceivably require a plaintiff to join in his suit for recovery of immoveable property causes of action which by section 44 he is precluded from joining without the leave of the Court or, at any rate, would render unnecessary the latter part of exception (*a*) and exception (*b*) in that section.

Reliance is placed on behalf of the appellants on *Shanmugam Pillai* v. *Syed Gulam Ghose*(2), but that case is distinguishable;

(1) (1888) I.L.R., 11 Mad., 151.

(2) (1904) I.L.R., 27 Mad., 116.

MILLER AND SANKARAN-NAIR, JJ.

SUBRAYA CHETTI v. RATHNAVELU CHETTI.

the learned Judges there hold that "there was but one cause of action, non-payment of rent," and "though rents became payable under different documents and at different times they are only different claims under the same cause of action or tenancy." The cause of action was based on the obligation to pay rent and the claims for rent for different years were claims in respect of that obligation and, therefore, in respect of the cause of action.

The cases in which it has been held that a claim for mesne profits due at the time of a suit for possession, may be subsequently enforced in a separate suit (*Lalessor Babui* v. *Janki Bibi*(1)) and *vice versâ* that a claim for possession may be enforced after a claim for mesne profits has been made good in a former suit (*Tirupati* v. *Narasimha*(2), *Monohur Lall* v. *Gouri Sunkur*(3)) are not so strong as the present case. They may be open to the observation made by the learned Judges in *Mewa Kuar* v. *Banarsi Prasad*(4) in which the opposite view is taken to the effect that the cause of action for possession and the cause of action for mesne profits are one and the same; the wrongful possession of the defendant. By wrongfully holding on to the property the defendant deprives the plaintiff of his possession and the fruits thereof. This view has the support also of *Venkoba* v. *Subbanna*(5) to which we have referred; but that case has been departed from and the Calcutta cases followed in a recent case in this Court (*Gutta Saramma* v. *Maganti Ramnadu*(6)) and we are not called upon to decide between them. In the suits with which we are concerned the causes of action are clearly different and we do not think that the claim now made is a part of the claim which the plaintiff was entitled to make in respect of the cause of action in the former suit.

We therefore dismiss the Letters Patent appeal with costs.

(1) (1892) I.L.R., 19 Calc., 615.
(2) (1888) I.L.R., 11 Mad., 210.
(3) (1883) I.L.R., 9 Calc., 283.
(4) (1895) I.L.R., 17 All., 533.
(5) (1888) I.L.R., 11 Mad., 151.
(6) (1908) I.L.R., 31 Mad., 405.

APPELLATE CIVIL.

Before Mr. Justice Miller.

1908. December 4.

SREE KRISHNA DOSS (PETITIONER), PETITIONER,

v.

CHANDOOK CHAND (RESPONDENT), RESPONDENT.*

Civil Procedure Code, Act XIV of 1882, ss. 295, 622—Interference of High Court on revision against an order under s. 295 of the Code of Civil Procedure.

The High Court will not, as a general rule, interfere by way of revision under section 622 of the Code of Civil Procedure, when the party has a remedy elsewhere than in the High Court. The High Court will however interfere, where the right of the party is clear and where the result of non-interference will be only to multiply proceedings by driving the party to a suit, in which there can be no defence.

A Court, which has found that a party is entitled to rateable distribution under section 295 of the Code of Civil Procedure, has no discretionary power to refuse such relief; and in refusing to grant it such Court declines a jurisdiction vested in it by law.

PETITION under section 622 of the Code of Civil Procedure, praying the High Court to revise the order of C. V. Kumaraswami Sastri, City Civil Judge, Madras, in Civil Miscellaneous Petition No. 1162 of 1907 in Execution Petition No. 382 of 1907.

The plaintiff attached certain properties belonging to defendant in execution of two money decrees obtained against him. Subsequent to his application for execution the counter-petitioner, who had a money decree against defendant, brought to sale certain other properties of defendant, and, with the permission of the Court bid for and purchased the properties, and after setting off his decree amount, paid the balance of the purchase money into Court.

The plaintiffs applied under section 295 that the counter-petitioner should be directed to pay into Court the whole purchase money to be rateably distributed. The lower Court passed an order, the material portion of which is as follows :—

"Under these circumstances, the question is, whether I ought to set aside the order allowing counter-petitioner leave to bid and to set off and to direct him to bring the money into Court. That I have got the power to do so is clear from the case of

* Civil Rivision Petition No. 168 of 1908.

Madden v. *Chappani*(1), but I am not bound to do so if the other attaching creditor has assets against which he could proceed. In the present case, there is the further fact that the counter-petitioner obtained leave to bid on the 4th October 1907 before the properties were actually attached by the petitioner, and there is nothing to show that he was aware of the execution proceedings taken by the petitioner when he obtained leave to bid and purchased. It is always open to the petitioner to exhaust his remedies against the remaining properties of the judgment-debtor and to file a regular suit under section 295 of the Code against counter-petitioner for any balance that might be due if rateable distribution had been ordered.

The petitions are dismissed. Under the circumstances each party will bear his own costs."

The plaintiff moved the High Court to revise the order under section 622 of the Code of Civil Procedure.

T. R. Venkatarama Sastri for petitioner.

T. Rajagopalachariar for *V. V. Srinivasa Ayyangar* for respondent.

JUDGMENT.—The learned Judge of the City Civil Court has found that the petitioner is entitled under section 295 of the Code of Civil Procedure to rateable distribution but has refused his application therefor on the ground that there is other property of the debtor which though not yet realized by execution in the Court may be made available for the satisfaction of his claims: relying on *Madden* v. *Chappani*(1) he has referred the petitioner to a separate suit.

I have no doubt that this order is one which can be revised under section 622 of the Civil Procedure Code: that is established by *Tiruchittambala Chetti* v. *Seshayyangar*(2) and *Viraraghava* v. *Parasurama*(3). Here the learned Judge has declined jurisdiction holding wrongly as I think that he has a discretion so to do. Section 295 does not give such a discretion; it does not permit the Judge in his discretion to refuse to a party, who to his knowledge is entitled to relief under the section, the relief to which he is entitled. The decision in *Madden* v. *Chappani*(1) does not illustrate the circumstances in which a Judge would be justified in referring a party to a suit, but I imagine that they would be

(1) (1888) I.L.R., 11 Mad., 356. (2) (1882) I.L.R., 4 Mad., 383.
(3) (1892) I.L.R., 15 Mad., 372.

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circumstances in which there might arise a question whether there was a right in one or other of the parties to the relief for which the section provides. Here there is no such question.

Then it is said that because there is a remedy by suit I should not interfere. I do not depart from the view to which I have recently given expression that, where a party has a remedy elsewhere than in the High Court, the High Court should not except in special cases interfere under section 622.

But here we have a case in which there is no doubt as to the rights of the parties, and no remedy if I do not interfere, except by a suit to which there can be no defence, and which therefore would merely multiply proceedings.

In such a case the lesser evil, at any rate, is interference under section 622.

I set aside the order of the learned Judge and direct him to make a fresh order according to law.

The respondent will pay the appellant's costs of this petition.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. January 12.

PONNUSAMY NADAR AND OTHERS (COUNTER-PETITIONERS—DEFENDANTS NOS. 3 TO 6), APPELLANTS,

v.

DORAISAMY AYYAR (PETITIONER—PLAINTIFF), RESPONDENT.*

Civil Procedure Code—Act XIV of 1882, s. 246—Not applicable where both the decrees are not before the Court for execution.

Section 246 of the Code of Civil Procedure applies only where both the decrees which are sought to be set off against each other are before the Court for execution.

Chajmal Das v. *Lal Dharam Singh* [(1902) I.L.R., 24 All., 481], followed.

Sinnu Pandaram v. *Santhoji Row* [(1903) I.L.R., 26 Mad., 428], distinguished.

APPEAL against the order of T. V. Anantan Nayar, Subordinate Judge of Kumbakónam, in Execution Application No. 822 of

* Appeal against Order No. 190 of 1907.

MUNRO AND ABDUR RAHIM, JJ.

PONNUSAMY NADAR v. DORAISAMY AYYAR.

1906, in Execution Petition No. 251 of 1905 in Original Suit No. 78 of 1899.

The plaintiff (petitioner) who had obtained a mortgage decree against defendants in Original Suit No. 78 of 1899 applied to execute the decree by sale of the hypothecated properties.

Defendants No. 3-7 had a decree on a prior mortgage of the lands against the first defendant the mortgagor, and the first defendant had also a money decree against defendants Nos. 3-7. No application for execution had been made by the first defendant or defendants Nos. 3-7.

The question arose whether the property should be sold subject to the full amount of the decree held by defendants Nos. 3-7 or subject only to the amount by which such decree exceeded the amount of the decree held by the first defendant by setting off the decrees against each other under section 246 of the Code of Civil Procedure. The Subordinate Judge at first held that the decree of the defendants Nos. 3-7 being a mortgage decree, the money decree of the first defendant could not be set off against it.

Subsequently, he revised his orders and held that they could be set off and directed the sale of the properties subject to the amount by which the mortgage decree of defendants Nos. 3-7 exceeded the money decree of first defendant.

The defendants Nos. 3-6 appealed.

T. V. Seshagiri Ayyar for appellant.

The Hon. the Advocate-General and *K. Ramachandra Ayyar* for respondent.

JUDGMENT.—What the plaintiff wants to do is to set off the decree in Original Suit No. 37 of 1893 against the decree in Original Suit No 25 of 1899. He can only do this, if at all, under section 246 of the Civil Procedure Code. This section, however, clearly requires that both the decrees should be before the Court for execution. *Vide Chajmal Das* v. *Lal Dharam Singh*(1). The precise point now under consideration was not raised and decided in *Sinnu Pandaram* v. *Santhoji Row*(2). The above requirement is not satisfied in the present case. We reverse the Lower Court's order and restore the order of the Subordinate Judge, dated the 13th October 1906, with all costs subsequent thereto.

(1) (1902) I.L.R., 24 All, 481. (2) (1903) I.L.R., 26 Mad, 428.

APPELLATE CRIMINAL.

Before Mr. Justice Benson and Mr. Justice Miller.

1909. March 25, 26, 29. April 14.

GADICHERLA HARISARVOTHAMA RAO (SECOND ACCUSED), APPELLANT IN CRIMINAL APPEAL No. 174 OF 1909,

v.

KING-EMPEROR, RESPONDENT.*

KING-EMPEROR, PETITIONER IN CRIMINAL REVISION CASE No. 69 OF 1909,

v.

BODI NARAYANA RAO AND GADICHERLA HARISARVOTHAMA RAO (ACCUSED), RESPONDENTS IN THE ABOVE.

Penal Code XLV of 1860, s. 124-A—Declaration under Act 25 of 1867, presumptive evidence of liability as printer and publisher—Criminal liability of proprietor of newspaper—Authority of proprietor to publish, proof of—s. 14 of the Evidence Act.

A person, making a statutory declaration under Act XXV of 1867, that he is the printer and publisher of a newspaper is presumably liable as such printer or publisher but may rebut such presumption.

Ramaswami v. *Loganatha* [(1886) I.L.R., 9 Mad., 387, at p. 390].

The liability of a proprietor is not governed by the Act and depends upon different considerations. The ground of liability in his case is that he authorised the publication of the incriminating article. The authority may be established by direct proof or as a reasonable inference from all the facts of the case.

Under section 14 of the Evidence Act, it is open to the Court to presume that the proprietor, having the control of the paper authorises the publication of the matter which appears in it. Such a presumption may be improper in the case of a large paper, with a separate editor responsible for the selection and publication of the literary matter, but in the case of a petty paper, with no responsible editor and published under the eye of the proprietor, the presumption might be reasonable though it would be open to him to rebut such presumption, by showing that the publication was in fact not authorised by him.

Though no authority to publish libellous matter may have been originally given, such authority may be inferred from the conduct of the parties, such as the publication of other libellous matter without any remonstrance or interference from the proprietor when it has come to his knowledge. Other issues of the same paper containing libellous matter are relevant as evidence to prove such authority.

* Criminal Appeal No. 174 of 1909 and Criminal Revision Case No. 69 of 1909.

BENSON AND MILLER, JJ.

HARI-SARVOTHAMA RAO v. KING-EMPEROR.

Mere absence of the proprietor at the time of the publication of the libel will not rebut such presumption if during such absence he exercises complete control over the paper.

The English law on the subject discussed.

The Queen v. *Holbrook*, [(1878-9) 4 Q.B.D., 42], referred to.

APPEAL against the sentence of P. Kershasp, Sessions Judge of Kistna Division, in cases Nos. 33 and 34 of the Calendar for 1908.

The facts for the purposes of this report are sufficiently stated in the judgment.

T. Prakasam, and *Kunjunni Nair*, for second accused in the Appeal and in the Revision case.

The Public Prosecutor in support of the conviction in the appeal and on behalf of the petitioner in the Criminal Revision case.

The first accused was not represented.

JUDGMENT.—In this case, Bodi Narayana Rao and G. Harisarvothama Rao have been convicted of an offence punishable under section 124A, Indian Penal Code, in respect of an article published in the Telugu weekly journal "Swaraj" on the 26th March 1908. The former, Narayana Rao, on the 18th March 1908 made the statutory declaration under Act 25 of 1867 that he was the owner of the Swaraj Press and the Printer and Publisher of the "Swaraj" newspaper. The latter was the "managing proprietor" of the paper. The article reads as follows:—

"*Perverted mind.*—It is unnecessary to mention in detail the inhuman cruelty the Feringhis showed (caused) to the patriots and natives in Tuticorin in the name of authority. Just as it is said that all those that are born in Lanka (Ceylon) are only Rakshasas, so it is known to the world that all the white faced (men) who are arriving in this country possessed of uncontrolled power, become ill-natured, hard-hearted and seized by the devil of envy; commit many horrible actions; and continue to venture to oppress the mild Indians even without fear of sin. Now, the great demon of the holy hymn of Vande Mataram seizes these merciless men, and makes them act under its influence. By the influence of this demon, they forget themselves and fan the great fire of people's power for their funeral pyre. Alas! Pity. What a seditious act did Chidambaram Pillai commit; what a murderous act did he do! would he have been prepared to go to jail rending the hearts of the Feringhis without admitting even at the request of the Collector that he committed an offence which he had never committed?

Oh! The sense of Justice of the Collector! As some people, being provoked by the whipping of the District Superintendent, began to throw stones, the Collector caused rifles to be fired to put down (avert) that great calamity, and got killed a young boy of 13 years returning from a temple with "Sacred food" in his hands, and two other unarmed and inoffensive passers-by. Even this is not without a strong reason. When questioned by the District Superintendent why the swadeshi shop was decorated, why should the shop clerk have uttered the words for welcoming Mr. Pal which sound very harsh to the ears of the Feringhi people? What if they were uttered? Why should the natives indicate their anger without keeping quiet like dogs, when the clerk was whipped by the Superintendent? What other less punishment than what he had actually inflicted could the Collector have imposed on such mischievous people?

"Hallo? Feringhi, Cruel tiger! You have indeed devoured simultaneously three inoffensive Indians in a moment without any cause. You have been transgressing your own laws too. You, fear-stricken man, it is natural for men blinded by arrogance to entertain such perverted thoughts. You yourself have exposed your secret. You have declared that the arbitrary Feringhi rule is drying up at the mere breeze of the development of Indian nationality."

The article is undoubtedly one calculated to bring the Government established by law into hatred and contempt and to excite disaffection towards it. If it was published by, or by the authority of, the accused they were rightly convicted. The plea of the first accused was that though he was styled editor, he was so only in name, that he did not write articles, that his duties were mainly those of a clerk keeping registers and the like for a remuneration of Rs. 15 monthly. He, however, admitted that he used to receive articles written by others and "pass" them and hand them on to the printer and get them published. This accused has not denied that he did this in respect of the article incriminated, nor has he attempted to show that he is not liable as the printer and publisher. He is not illiterate. The fact that he made the statutory declaration raises a presumption of his liability as printer and publisher, and as he has not rebutted the presumption his liability is conclusively established (*Ramasami* v. *Lokanada* (1)). In his

(1) (1886) I.L.R., 9 Mad., 387 at p. 399.

statement before the Magistrate he said that the second accused wrote the incriminated article, but that statement cannot be considered as against the second accused inasmuch as the first accused did not make a confession of his own guilt but merely desired to throw all the guilt on the second accused. The second accused before the Magistrate declined to make any statement, and before the Sessions Judge he merely pleaded that the article was published during his absence in another village, and that he only lent his name to the paper.

The Sessions Judge, by some strange confusion of thought, ruled that under the terms of the sanction given by Government for the prosecution, it was not open to the prosecution to prove the authorship of the article. There is therefore no evidence on that point, though it would obviously have been the most direct and complete means of proving the guilt of the accused. It is necessary therefore to see whether there is evidence to show that the article was published by his authority, so as to render him criminally liable.

The criminal liability of the proprietor of a newspaper under the English Common Law as now modified by Lord Campbell's Act, 6 and 7 Victoria c. 96, section 7, has been fully explained in the leading case of *The Queen* v. *Holbrook* (1). That whole case is deserving of the most careful study as an authoritative exposition of the criminal liability of the proprietor of a newspaper in respect of the matter published by its means. In that case it "was proved that the literary department of the newspaper in question had been intrusted to an editor, who inserted in it what he thought fit in the way of articles, correspondence, etc., that of the three defendants, who were proprietors of the paper, each took the management of a particular department of the business other than the literary department; that at the time of the publication of the libel one of them was absent from home on account of ill-health, and that neither of them had given any authority for or consent to the publication complained of, or had any knowledge of the libellous article until his attention was called to it after the paper was in circulation." Lush, J., after referring to the Old Common Law of England under which the proprietor of a newspaper was criminally liable for the publication of a libel in its columns,

(1) (1878-9) 4 Q.B.D., 42.

even if the libel was inserted without his knowledge, quoted section 7 of 6 and 7 Victoria c. 96 "whensoever upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, *evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority*, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care and caution on his part," and added that the law, as thus modified, was that "an authority from the proprietor of a newspaper to the editor to publish what is libellous is no longer to be, as it formerly was, a presumption of [illegible] Before the Act the only question of [illegible] authorised the publication of the [illegible] authorised the publication of the [illegible] *production of the paper which contains the libel, coupled with proof that the defendant is the proprietor*, is prima facie *evidence that he caused the publication of the libel and the onus is on him to prove the negative.* But when he has proved that the literary department was intrusted entirely to an editor, *the question what was the extent of the authority which that employment involved is to be tried upon the principle which is applicable to all other questions of authority.* And I think the jury ought to be told, in this as in every other case, that criminal intention is not to be presumed, but is to be proved, and that, in the absence of any evidence to the contrary, a person who employs another to do a lawful act is to be taken to authorise him to do it in a lawful and not in an unlawful manner.

The learned Judge then added these most important words, "*I am far from saying that the mere appointment of an editor without supervision or control may not, in some cases, involve an authority to publish libels. If the paper was a calumnious paper, its general character would negative the ordinary presumption of innocent intention, and fairly lead to the inference that the proprietor authorised the insertion of slanderous articles.*"

Cockburn, C.J., sums up his conclusions in these words: "I have no hesitation in saying that where a general authority is given to an editor to publish libellous matter at his discretion, it will avail a proprietor nothing to show that he had not authorised the publication of the libel complained of. It is equally clear that

though in the authority originally given to the editor no license to publish libellous matter may have been contained still *such an authority may be inferred from the conduct of the parties, as, for instance, from the fact that other libels have been published in the paper, which have come to the knowledge of the proprietor and without his remonstrance or interference, or the removal of the editor, from which the assent of the proprietor might well be inferred.* I therefore do not feel the apprehension which has been expressed of the mischief which would result from the impunity which newspaper proprietors would derive from holding them free from criminal responsibility, when they employ an editor with general authority to conduct the paper. *The impunity would quickly cease if they suffered the paper to become the vehicle of calumny. There are journals as to which no jury would hesitate to say that the editors were authorised by the proprietors to invent or give currency to libel.*"

Lord Campbell's Act, of course, is not in force in India, and the Criminal Law of England is not necessarily the same as the Criminal Law of India as contained in the Indian Penal Code; but, as pointed out by Cockburn, C.J., the purport and effect of Lord Campbell's Act was to bring the "law into harmony with general principles" (page 60), and those principles are applicable in construing the law as laid down in the Indian Penal Code (Mayne's Criminal Law of India, 2nd Edition, page 522). As stated by Petheram, C.J., the offence under section 124A "is attempting to excite disaffection by words intended to be read, and I think that, whoever the composer or writer might be, *the person who used them for that purpose, within the opinion of the jury*, was guilty of an offence under Section 124A" (*Queen-Empress* v. *Jogendra Chunder Bose*(1).

Strictly speaking the publication of a seditious article in a newspaper is not ordinarily the work of either the writer alone, or of the proprietor alone or of the editor alone or even of all three together. They employ the compositor to print the article, and the post office or other agency to distribute it, but the maxim *qui facit per alium facit per se* applies, and the publication is held to be the act of the person or persons who authorised it, and the grant of the authority may be proved by direct evidence or as a reasonable inference from the conduct of the parties and all the

(1) (1892) I.L.R., 19 Calc., 35 at p. 41.

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surrounding circumstances. In each case it is a pure question of fact, to be proved like any other fact by direct evidence or as a reasonable inference from facts proved or admitted, and considered in relation to all the circumstances of the particular case.

Section 14 of the Indian Evidence Act lays it down as a rule that "the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the course of . . . . human conduct, and public and private business in their relation to the facts of the particular case," and it gives as a familiar illustration of the rule the case of a person found in possession of property recently stolen. The Court may presume either that he stole the property, or that he received it knowing it to be stolen, unless he can account for his possession. So in the case of a newspaper as pointed out by Lush, J., in the passage already quoted it is open to the Court to presume that the proprietor, who from his very position as proprietor has the control of the paper, authorises the publication of the matter which appears in it. But the propriety of making such a presumption depends on circumstances. It would obviously be improper in the case of a large paper, with a separate editor who was responsible for the selection and publication of the literary matter. It would be equally improper in the case of an absentee proprietor. In both these cases the original presumption would be rebutted by the additional facts and it would be necessary for the prosecution to give proof, direct or as a matter of reasonable inference, that the proprietor did, in fact, authorise the publication. But in a petty paper, with no separate editor responsible for the literary matter, and published under the eye of the proprietor, the presumption might be an eminently reasonable one, though, of course, it would be open to the proprietor to rebut it and prove that the publication was, in fact, not authorised by him. Act 25 of 1867 has nothing to do with the liability of the proprietor of the newspaper. It establishes the *primâ facie* liability as publisher of the person who is the declared printer or publisher. In his case the prosecution need not give any evidence that he is, in fact, the publisher. It is enough to produce the declaration. But in the case of a person incriminated as proprietor it is necessary first of all to prove that he is the proprietor. The question of what presumption, if any will arise from such proof will depend on circumstances; and the proprietor's liability for the publication of the matter must be

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established to the satisfaction of the Court by direct proof or as a matter of reasonable inference from all the facts of the case.

Let us now see what was the position and conduct of the second accused. From an entry in the second accused's diary under date the 11th March 1908, and from the evidence of Viramallayya (prosecution witness No. 10) it appears that on that day the second accused, and the first accused and the brother (Iswara Rao since deceased) of the witness and one P. Lakshminarayana entered into an agreement for the revival of the "Swaraj" paper, which had ceased publication a short time previously. The terms of the agreement are not recorded in the diary, but from the evidence of the tenth witness it appears that second accused was to be the managing proprietor, first accused, the editor on a fixed pay of Rs. 15 *per mensem*, Lakshminarayana was to finance the paper and be treasurer, and Iswara Rao, who owned a press, was apparently to do the printings. The second accused was to have thirty-one shares out of hundred in the venture, and the other three persons twenty-three shares each. On the next day the second accused left Bezwada, where the revived "Swaraj" was being printed and went to the village of Garagaparru, where he lived for nearly a month in the house of the eleventh witness for the prosecution. On the same day (12th March) the first issue of the revived "Swaraj" appeared. It is entitled in English "A Nationalistic Telugu Weekly" and G. Harisarvothama Rao, M.A., is stated to be its proprietor, and B. Narayana Rao, its editor. There is also an introduction in the issue of the twelth headed "Ourselves" in which there is a grandiloquent eulogy of B. C. Pal, and the rebirth of the paper is connected with his release from prison; the object of the paper is stated to be "the infusion of the new spirit in the Telugu country," and it is announced that Srijut G. Harisarvothama Rao Pantulu Garu, M.A., "*has assumed* the Athipatyam" of the paper. There has been some discussion as to the meaning of the word "*Athipatyam*." It appears to be used to signify either the editorship or the proprietorship of a paper or both. Probably its meaning as used in the article is best indicated by the words which the paper has chosen to describe the second accused's connection with it, viz., "managing proprietorship." In a small paper of this kind duties, which in a large paper would be performed by separate persons, are often performed by the same person, and even if

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there is a nominally complete staff, the definition of duties is rarely complete. The same man is often Proprietor, Editor, Printer and Manager. The use of the words "*has assumed*" the Athipatyam is not appropriate to a bare proprietorship, but must refer to the duties of editor or manager or both.

So likewise on the blank post cards (exhibits O and O_1) found at the "Swaraj" office there are printed in English the words "Swaraj, a High Class Telugu Weekly, Established 1907, G. Hari Sarvothama Rao, M.A., Managing Proprietor." In the issue of the 26th March 1908 in which the article charged as seditious is printed there is the same statement that G. Hari Sarvothama Rao, M.A., is the proprietor. It is therefore clear that the second accused was prominently put forward by the paper as its managing proprietor and in fact had the largest share in it as proprietor. It is also clear that notwithstanding his living for some time in another village, he was in fact actively engaged in the work of managing and supervising the issue of the paper. On the 14th March, that is two days after leaving Bezwada, he writes exhibit S (1) from "Camp, Garagaparru" on paper which belongs to the 'Swaraj' newspaper as shown by the printed words on the margin of the paper. The letter is addressed to Lakshminarayana, one of the three persons who started the paper with the second accused. It runs: "Sending matter to-morrow. How is it we have not yet got last paper? Have Mr. Kaleswara Row and Mr. Narasimham given their contributions? What about the old "Swaraj" Editor? It seems he threatened he would withdraw his declaration. If that should happen, some one of you declare and let the paper stop on no account. Ask Mr. Veeramalliah to correct proofs. Be prompt. Send 20 papers to my address. All well. Rest in my next. Hoping this finds you in sound health.

Yours sincerely,
G. HARI SARVOTHAMA RAO."

Now here we see the second accused promising to send matter for publication, and enquiring (as an editor might) about other expected literary contributions. He also gives authoritative instructions as to the person (tenth witness for the prosecution) who is to correct the proofs and the steps to be taken if the declared printer and publisher of the defunct "Swaraj" should withdraw

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his declaration. He says that if that should happen "one of you" should declare and not let the paper stop on any account. What he expected appears to have happened, for on the 18th March one of them, viz., the first accused signed the statutory declaration (exhibit F) as printer and publisher of the paper. The second accused also in the above letter directed 20 copies of the paper to be sent to his address evidently for distribution to others. Every sentence in this letter shows, that this accused so far from being a mere name lender or a person with a bare pecuniary interest was the mainspring and Director-General of the venture and was discharging in his own person the duties of both the editor and the manager and was actively engaged in the distribution of the paper.

Not less instructive is exhibit P written on the next day (15th March) to the same person as follows:—

"GARAGAPARRU,
"15*th March* 1908.

"DEAR LAKSHMINARAYANA,

"Paper not satisfactory. Order pink by wire. Look to corrections carefully. Arrangement of matter should be attended to. Remove at once Kancerla Venkatakrishnayya's foreign cloth advertisement, and in the next note put a note that it was published by mistake, or the paper may go unpopular. All well. Hoping this finds you in sound health.

Yours sincerely,
G. HARI SARVOTHAMA RAO.

"Send one copy V.P. to Pammi Venkatanarasimhulu Garu, Pipparu."

Here again we see him issuing authoritative orders (not mere advice) as to the kind of paper to be used, the correction of proofs, the arrangement of the printed matter, and the distribution of copies, and even directing the immediate removal of an advertisement regarding foreign cloth, lest it should render this "Swarajist" paper unpopular with its readers. The order was too late to stop the offending advertisement in the issue of the 19th March, but it was removed from that of the 26th March in accordance with his orders.

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These letters were addressed to Lakshminarayana, who appears to have been more actively engaged in bringing out the paper than the nominal editor, first accused. We, however, find the second accused on the 16th April writing exhibit P (2) to first accused at the "Swaraj" office to inform him of his movements and enquiring about the issue of the weekly paper.

Then there is the evidence of the eleventh witness for the prosecution in whose house second accused lived while at Garagaparru who proves that the second accused described himself to him as the proprietor of the "Swaraj" and used to write newspaper articles and adds that on one occasion he saw him taking packets to the Post Office and accused told him that the packets were for the "Swaraj" journal. Exhibit P (1) addressed to the first accused at the "Swaraj" office on the 5th April evidently refers to one of these packets. The evidence above referred to and especially the letters S (1) and P show that though the second accused was living in Garagaparru, not Bezwada, he was directing and controlling the publication of the paper in the most minute, as well as in the most important, matters, and he was doing this as one invested with and exercising complete authority in all departments. It is difficult to see what closer or more direct authority he could have exercised if he had been sitting in an editorial chair in the house where the paper was printed. In these circumstances it is a reasonable inference that what appeared in the paper appeared there under his authority; and this inference is strengthened by his own conduct in never repudiating or apologising for the seditious matter in the paper itself, or warning first accused or Lakshminarayana not to insert such matter again, or attempting to stop the sale of issues containing seditious matter. We have seen that second accused at once and authoritatively interfered when an advertisement regarding foreign cloth appeared in the paper and it was discontinued. But not so with the seditious articles. Not only is there no apology or explanation or disclaimer, but we find further seditious articles in the issues of the 9th and 16th April [exhibits Q(1) to Q(3) and Q]. The Public Prosecutor in the Sessions Court attempted to file other issues in order to further prove the seditious character of the paper, but the Sessions Judge improperly refused to admit them. Such evidence ought to have been

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admitted as relevant, for, as observed by Cockburn, C.J. (*The Queen* v. *Holbrook*, p. 61), "It is clear that though in the authority originally given to the editor no license to publish libellous matter may have been contained, still such an authority may be inferred from the conduct of the parties, as for instance, from the fact that other libels have been published in the paper, which have come to the knowledge of the proprietor and without his remonstrance or interference, or the removal of the editor, *from which the assent of the proprietor might well be inferred* . . . . There are journals as to which no jury would hesitate to say that the editors were authorized by the proprietors to invent or give currency to libel."

In this connection it is not out of place to remember that the second accused had been a short time previously expelled from Rajahmundry College for taking part in political meetings in connection with B. C. Pal, and for disobedience to the Principal, and his re-employment in the Educational Service of Government had been prohibited by notification in the Government Gazette. His diary shows that he attended Pal's celebration on the 9th March in Bezwada. On the 12th the "Swaraj" is established with him as chief proprietor in connection with Pal's release and for the purpose of spreading "the new spirit" in the Telugu country, and then follow a series of seditious articles, one of which is the subject of the present charge. There is evidence and it is clear that the nominal editor (first accused) was not a man of sufficient education or literary ability to write the incriminated article which is written in a highly Sanskritized style. The second accused has not attempted to show that the article was not published by his authority. He has not even denied that it was so published, nor has he made any statement or called any evidence to show what his relations with the nominal editor (first accused) really were. His absence in the village of Garagaparru leads to no presumption in his favour for his own letters show that while there he exercised the most authoritative and complete control over the paper both in large and small matters, and in fact exercised in his own person the duties both of editor and manager, as well as proprietor, and took an active part in distributing copies of the publication. In these circumstances there is good reason to infer that the seditious article charged was

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published by the authority of the second accused and that he is guilty of an offence under section 124-A, Indian Penal Code, as found by the Sessions Judge.

The Public Prosecutor has applied on behalf of Government for an enhancement of sentence in the case of both the accused on the ground that such comparatively short sentences of simple imprisonment are not deterrent, but rather serve as an encouragement to sedition by enabling the guilty persons to obtain a cheap notoriety and to pose afterwards as martyrs. The first accused appears to us to have been to a large extent a tool in the hands of the second accused, but it is clear that he was not an inactive tool as he was also engaged in making speeches in the villages as well as in assisting the publication of the seditious paper. We think that in his case it is not necessary to enhance the period of imprisonment but we resolve to direct that so much of it as is still unexpired be rigorous instead of simple. The second accused was evidently the moving and controlling spirit in regard to the paper. His past history and the scandalous article (exhibit Q(1)) in which His Excellency the Governor is attacked by name and grossly libelled indicate that he was actuated more by personal malice than by any mistaken feeling of so-called patriotism. We think that the Sessions Judge has taken altogether too lenient a view of the offence and of the consequences likely to follow from such inflammatory writing if permitted to continue. We resolve to enhance the sentence to three years' imprisonment, and direct that so much of this period as is still unexpired be rigorous.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Miller and Mr. Justice Abdur Rahim.

KUTTASSERI ERIAT GOVINDAN NAIR AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

KUTTASSERI ERIAT SANKARAN NAIR AND OTHERS (DEFENDANTS), RESPONDENTS.*

1908. October 2. November 23. December 3. 1909. March 8, 9. April 14. July 19.

Marumakkatayam Law—Separate property of member of Tarwad lapses to the Tarwad.

On the question whether the separate property of a member of a Tarwad lapses to the Tarwad or is inherited by his Tavashi:

Held, per SIR ARNOLD WHITE, C.J., and ABDUR RAHIM, J. (Miller, J., dissenting) that the separate property of a member of a Tarwad lapses on his death to the Tarwad.

Per MILLER, J.—The separate property of a member of a Tarwad is inherited by his Tavashi.

Kallati Kunju Menon v. Palat Erracha Menon, [(1864-65) 2 M.H.C.R., 162], referred to.

SECOND APPEAL against the decree of M. Mundappa Bangera, Subordinate Judge of South Malabar at Calicut, in Appeal Suit No. 141 of 1905, presented against the decree of A. Narayana Nambiar, District Munsif of Manjeri, in Original Suit No. 64 of 1904.

The facts of the case for the purpose of this report are fully stated by (Miller and Sankaran-Nair, JJ.) in the Order of Reference to a Full Bench which was as follows:—

ORDER OF REFERENCE TO A FULL BENCH.—The suit is brought by the junior members of a Marumakkatayam Tarwad against their Karnavan to recover arrears of maintenance. The Karnavan's defence is that the plaintiffs are already in possession of Tarwad property which, in the circumstances of the case, is sufficient to satisfy their claim. To this it is replied that the property referred to does not belong to the tarwad. The decision of this question depends upon the rule of law applicable to the

* Second Appeal No. 101 of 1906.

inheritance to the separate property of a member of a Malabar Tarwad.

The properties are found by the lower Appellate Court to be the self-acquisition of two deceased members Paru Amma and her son Krishnan Nair. It is contended for the appellant by Mr. Sundara Ayyar that, on the death of Krishnan Nair, the survivor, they devolved exclusively on the second defendant the sole surviving decendant of Paru Amma, while Mr. Subrahmania Sastri for the respondents urges that they lapsed on his death to their Tarwad of which the first defendant is the Karnavan and the second defendant is only one of the junior members.

The reported cases undoubtedly support the contention advanced on behalf of the respondents and, as we are urged to overrule them, it becomes necessary to review the rulings of this Court on that point.

The earliest English writer on Marumakkatayam law is Mr. Strange who was for a long time in Malabar as Registrar and Judge and was subsequently a Judge of the Sudder Court. He states the law thus in his Manual of Hindu Law:—

"In the Province of Malabar, among the great body of its inhabitants, a different rule of descent prevails from what exists in the other districts of the Presidency, Canara excepted. The inheritance runs in the female, not in the male line. A man's sons are not in the line of his heirs. His property goes to his sisters; sister's sons; sister's daughters; sister's daughter's sons and daughters; mother; mother's sisters; etc."

The earliest decision of which we have any report is by Mr. Cook as Subordinate Judge of Calicut in 1852.

"According to the law of nepotism, a nephew may be heir to a Karnavan's private property, but as regards the Tarwad property the eldest member of the Tarwad is the rightful heir."

This rule is adopted by Mr. Justice Strange in the Manual already referred to. See section 399 of his Manual. "Self-acquired moveable property, namely, that which is obtained by individual exertion and without aid from the family funds, belongs exclusively to the acquirer, and may be disposed of by him at his pleasure. Females may hold it as well as males. On demise it descends in the case of males to their sister's sons, or nearest Anandravans, and in the case of females to their issue male and female."

It will be noticed that reference is made only to *moveable* property. This is due apparently to the fact that at that time there was nothing like self-acquired immoveable property, the Sudder Court (Hooper, Strange and Phillips, JJ.) having decided in 1859:

"It is immaterial in what way land is obtained in a family governed by Marumakkatayam the rule being that, however acquired by a member of the family, it becomes incorporated in the family possessions and is under all the restrictions as to alienation affecting such property."

The first decision to which our attention has been drawn in which a different rule was laid down is *Kamaran* v. *Ryru*. Mr. Holloway as Judge of Tellicherry held "The truth of the matter is that Kannen (the deceased Karnavan) acquired the property and, following the fallacy which is very prevalent, it has been supposed that his immediate juniors are those entitled to inherit it. It is unnecessary to say that this is not the law of Malabar, a law which I deplore as fruitful in mischief, but by which I am bound." It is said in Mr. Moore's 'Malabar Law' that this decision was confirmed by the High Court, but that no judgment was written or reasons recorded.

On this decision two observations have to be made. The first is that the self-acquisition of a member should be inherited by his immediate juniors is admitted to be a "very prevalent" belief. The opposite view presumably that it should lapse to the tarwad is "deplored as fruitful in mischief". The decision is not based on usage, and no authorities are referred to.

After he became a High Court Judge, Mr. Justice Holloway laid down the law in two decisions which are reported in *Kallati Kunju Menon* v. *Palat Erracha Menon*(1). In the first case Phillips and Holloway, JJ., held (see page 162) "Self-acquisitions of land by a member of a tarwad are his separate property during his life and may be charged by him for his personal debts. After his death they lapse into his tarwad property but if accepted by the members they carry their obligations along with them." In the second case—see page 163—Scotland and Holloway, JJ., said "It is unquestionably the law of Malabar that all acquisitions of any member of a family undisposed of at his death form part of the family property, that they do not go to the nephews of the acquirer

(1) (1864-65) 2 M.H.C.R., 162.

but fall as all other property does to the management of the eldest surviving male." Taking "tarwad" to mean a group of persons descended from a common female ancestress with community of interest with one another—the only sense in which it is used in a Court of Law—it is clear that the rule as above stated is not intended to lay down the law of succession applicable *generally* to a follower of the Marumakkatayam law. For the deceased may have been divided from the rest of the tarwad, and hence may not have been at his death a member of the tarwad. The earlier decision refers to "a member of a tarwad" and there is very little doubt that "family" in the second judgment is used in the same sense. It is to be noticed that Mr. Justice Holloway, about the same time, held that under the Hindu law a similar rule prevailed, *i.e.*, that the self-acquisition lapses to the co-parceners and is not inherited by the wife—*Varadiperumal Udaiyan* v. *Aradanari Udaiyan*(1).

The next case brought to our notice is *Palikandy Mannan* v. *Palikandy Kelappan*(2) in which it was held that a will was not binding upon the tarwad of the testator as the claim of the tarwad to take by survivorship prevailed over the right by devise which took effect only after the testator's death. The learned Judges (Innes and Muthusami Aiyar, JJ.) disagreeing with the Munsif Mr. E. K. Krishnan said "We must take it that the law is as laid down in *Kallati Kunju Menon* v. *Palat Erracha Menon*(3). The will then would not be binding upon the tarwad of the testator because according to the law applicable to such property the self-acquisition of the testator having been left undisposed of by him during his life-time was not validly disposed of by the will which could only take effect after his death." The decision did not proceed upon the ground that wills were unknown to or invalid under Marumakkatayam law but on the ground that they cannot operate against the claim by survivorship. If the ruling in *Kallati Kunju Menon* v. *Palat Erracha Menon*(3) referred to in the judgment declares the law correctly this seems to be the necessary conclusion.

The decision in *Vira Rayen* v. *Valia Rani Pudia Kovilagam*, *Calicut*(4) is based upon the customary law applicable to stanoms

(1) (1862–63) 1 M.H.C.R., 412.
(2) S.A. No. 534 of 1878 (unreported).
(3) (1864–65) 2 M.H.C.R., 162.
(4) (1878–81) I.L.R., 3 Mad., 141.

which is in many respects different from the ordinary law and is not applicable to the present case.

In the case next cited the representatives of the acquirer remained in possession of his property from 1859 to 1878. It was also found in that case, though the Judges said that the finding was unnecessary for the decision, that the Karnavan of the tarwad had acquiesced in the claim set up by the representatives. The learned Judges say "It is true that the opinion that the self-acquisition of an individual member descended to his own representatives has now been held to be erroneous, but its very prevalence, so far from showing that the possession was not hostile, explains and accounts for the adverse possession taken up by Rayiru." Here also the prevalence of the belief and the assertion of right in accordance therewith are noticed. After this decision whenever the representatives of the deceased acquirer of property have been in possession for more than twelve years, and the Karnavans as a rule are not active in enforcing the claims of the tarwad against the junior members in possession of the properties of a deceased member, the Courts refuse to draw the usual presumption of permissive occupation of tarwad property by a junior member but refer such possession to the claim as heir and representative. While the rule has been materially restricted in its operation by this decision, the next case, if not destructive of the principle on which it is based, certainly involves a very wide departure. The point was whether the self-acquired property which lapses to the tarwad according to these decisions enures as assets of the deceased for the payment of his debts. If the tarwad took by survivorship the members while taking the property would not be liable to pay the debts. The learned Judges (Innes and Muthusami Aiyar, JJ.) point out that the self-acquisition of a member of a tarwad stands on the same footing as the self-acquisition of a member of a Hindu family under the Mitakshara law and that according to the decision of the Privy Council in the *Sivaganga* case(1) such property does not devolve by survivorship as the co-parcener had no communion of interest in it with the other co-parceners. They say "He is, as it were, divided from them in respect of it. If they take it by reason of his leaving no descendants

(1) (1861–64) 9 M.I.A., 543.

and no widow, they take as heirs and not as parceners." They apply this principle to the Marumakkatayam tarwad—*Ryrappan Nambiar* v. *Kelu Kurup*(1). This decision has been followed by the late Chief Justice and Benson, J., who held that an undivided member of a tarwad may dispose of his property by will, overruling the decision in *Palikandy Mannan* v. *Palikandy Kelappan*(2). See *Achutan Nayar* v. *Cheriotti Nayar*(3). The case of *Komu Nair* v. *Ittiatha Amma*(4) also was cited before us. It was there decided that though the self-acquisition of a person lapses to the tarwad on his death, yet, if such property was a gift from his father then his nearer representatives take such property to the exclusion of his tarwad. Whether it is on the ground that the gift must be presumed to have been intended by the father for the benefit of all his children, or whether it is an exception to the general rule on account of such presumed intent is not clear; but the result undoubtedly was still further to restrict in practice the operation of the rule in *Kallati Kunju Menon* v. *Palat Erracha Menon*(5). These decisions conclusively establish that the members of a tarwad do not take by survivorship but by succession and the only question for decision is who is the heir. In deciding this question of customary law it is important to consider whether the community have accepted the rule laid down in *Kallati Kunju Menon* v. *Palat Erracha Menon*(5) and whether the usage has been consistent with it. For a wrong decision may become the source of customary law. In *Alami* v. *Komu*(6) it was decided that a testator, the last member of a tarwad, could dispose of his property by will. The decision itself is not in point as in that case there was no tarwad and therefore there was no survivorship. But the facts found were that according to usage the practice of making wills by members of a tarwad was in vogue at least from 1826 and such wills were upheld against the other members. Usage, thus, did not recognize survivorship and the decision of the late Chief Justice and Mr. Justice Benson in *Achutan Nayar* v. *Cheriotti Nayar*(3) which was based upon the reason of the law is fully supported by usage; and the decision in *Palikandy Mannan* v. *Palikandy Kelappan*(2) which it overruled

(1) (1882) I.L.R., 4 Mad., 150.
(2) S.A. No. 534 of 1878 (unreported).
(3) (1899) I.L.R., 22 Mad., 9.
(4) (1900) 10 M.L.J., 57 at p. 59.
(5) (1864-65) 2 M.H.C.R., 162.
(6) (1889) I.L.R., 12 Mad., 126 at p. 132.

and which followed the decision in *Kallati Kunju Menon* v. *Palat Erracha Menon*(1) based on the theory of survivorship is certainly opposed in principle to the usage as proved in *Alami* v. *Komu*(2).

Mr. Wigram, after referring to the rule laid down in *Kallati Kunju Menon* v. *Palat Erracha Menon*(1) as undoubtedly in accordance with the ancient usage which regarded the family as an indissoluble unit and took no thought of the individuals composing that unit, observes, in his book on Malabar law, "A practice, however, appears to have sprung up of allowing self-acquired property to pass to the nearer heir in preference to the head of the family. Thus a woman's children inherited her self-acquisitions and a man's self-acquisitions were inherited by his nearest anandravan for the benefit of his branch," *i.e.*, in other words his tavazhi or the descendants of his mother. It would seem from Mr. Holloway's judgment in the Tellicherry case that this practice must have sprung up before his decision. Mr. Wigram appears to state the usage correctly, and Mr. Justice Holloway apparently refused to recognize it as opposed to the principle which he applied as well to Hindu Law as to Marumakkatayam usage that it is *not* the existence of co-parcenary with reference to the property in question that determines the question of survivorship but the status of co-parcenary among the persons as members of an undivided family, a view that cannot be maintained after the decision of the Privy Council in the *Sivaganga* case(3).

In the Aliya Santana families governed by the same law with this difference that the practice is more in conformity with the theory of the law, evidence of usage was taken, and it was found that it was "distinctly in favour of the claims of the heirs of the acquirer in his own branch and opposed to the claims of the tarwad" or in other words the same as Mr. Wigram found from his own experience to exist in Malabar. See *Antamma* v. *Kaveri*(4). Similarly, in the case of another large community to whom this rule was assumed to apply the Chief Justice and Mr. Justice Moore held that the question was open—*Chemnantha Attekunnath Lakshmi Amma* v. *Palakushu Thuppan Nambudri*(5).

(1) (1864-65) 2 M.H.C.R., 162.
(2) (1889) I.L.R., 12 Mad., 126 at p. 132.
(3) (1861-64) 9 M.I.A., 543. (4) (1884) I.L.R., 7 Mad., 575 at p. 577.
(5) (1902) I.L.R., 25 Mad., 662.

As to the opinion of native lawyers, the same judgment, *Antamma* v. *Kaveri*(1), states that Mr. Krishna Menon "denies the accepted rule respecting the devolution of property under Marumakkatayam law." Mr. Gopalan Nair, another experienced Subordinate Judge, said in a case where he had to deal with the devolution of the self-acquisition of a Mopla female, "Even in well-conducted Nair tarwads in Malabar where the Marumakkatayam law of inheritance obtains in all its purity and integrity, a female's property which is usually acquired by her more or less with funds derived from her parents or husband goes to her own children and I have never heard a single instance in which a good Karnavan has ever asserted the tarwad's rights to property of this character. Mr. K. R. Krishna Menon, than whom there is no better authority on Malabar law, has always maintained that a female's property would descend to her own children and not to the tarwad and the oft-quoted authority on the other side is the decision in *Kallati Kunju Menon* v. *Palat Erracha Menon*(2) where the question was as to the self-acquisition of a deceased *male* and not a *female* member." [See his finding in Appeal Suit No. 125 of 1885.] In *Komu Nair* v. *Ittiatha Amma*(3) Mr. Chandu Menon, another experienced Subordinate Judge, expressed a similar opinion that a person's tavazhi would exclude the tarwad. He said in submitting his finding "I have no doubt in saying that according to the decisions quoted in the order the rule of Malabar law is settled" and after referring to the above decisions he stated that they "clearly established this proposition and I should have taken these to be the guide in solving the problem I have before me but the common practice of Courts here has been very unsettled." Mr. Kamaran Nair, another experienced Judge, has stated his opinion in these words: "The acquisitions of an anandravan were inherited by his sister and nephew and these formed subordinate branches with distinct rights and a good Karnavan never interfered with them." . . . . "But the Courts. . . . . yielding to the force of what they considered to be inexorable logic decided that the tarwad, if anything, must be one and indivisible and that all the acquisitions of a deceased member must lapse into it." To the same effect is the opinion of

(1) (1884) I.L.R., 7 Mad., 575 at p. 577 (2) (1864–65) 2 M.H.C.R., 162.
(3) (1900) 10 M.L.J., 57 at p. 59.

the present Subordinate Judge of Palghat, Mr. Imbichunni Nair. "Under the immemorial custom of Malabar the private property of any individual member devolves on his immediate heirs, *i.e.*, brothers and sisters after his death and does not lapse to the tarwad." So also the late E. K. Krishnan, a Subordinate Judge of great experience, stated. "There is a strong desire and conviction on the part of the people that their self-acquisitions should go to their tavazhi and not to the tarwad Karnavan. I believe the people have been disposing as far as possible of their self-acquisitions by gift *inter vivos* to their own tavazhi, so as to leave none to the tarwad Karnavan. If the general feeling of the people were respected, the law would pass self-acquisitions to the tavazhi"—see their printed opinions annexed to the report of the Malabar Marriage Commission.

We have not referred to the opinions of Pleaders and Munsifs supporting the above view in the same report. There is apparently no lawyer who supported the law as laid down in *Kallati Kunju Menon* v. *Palat Erracha Menon*(1).

It is impossible to ignore this mass of native legal opinion.

The decision in *Kallati Kunju Menon* v. *Palat Erracha Menon*(1) can hardly be supported in principle. Their Lordships of the Privy Council have pointed out in the *Sivaganga* case(2) the process of reasoning to be applied in such cases. They first state the law applicable to the succession to the property of a divided member and then proceed to consider whether any exception to that rule has been made out in the case of an undivided member who may own separate property. It cannot be denied that the heirs of a follower of the Marumakkatayam law, who does not belong to a tarwad, having been for instance divided from it are his tavazhi, as stated by Mr. Wigram, *i.e.*, in the case of a female her own children, in the case of a male the descendants of his mother. Mr. Subrahmania Sastri for the respondents suggested that the heirs may be all those who were members of the tarwad at the time of partition. They may be a hundred and more of varying degrees of relationship. This is not supported by any decision or writer on Malabar law. The text which explains the Brahman view of the Marumakkatayam law which is thus translated by Mr. Logan in his Malabar Manual

(1) (1864–65) 2 M.H.C.R., 162. (2) (1861–64) 9 M.I.A., 543.

(page 157) "The right of inheritance goes towards the nephews" shows that, the community had long passed the stage when the right of dealing with self-acquisition in his life time was only conceded as a privilege.

Though, therefore, the decision in *Kallati Kunju Menon* v. *Palat Erracha Menon*(1) was passed in 1863, we find that the principle of that decision has been departed from in subsequent decisions; the ruling itself has been treated as a departure from the customary law and has not been acquiesced in. It does not in terms apply to the separate property of females; we are therefore of opinion that we are not justified for reasons already stated in applying it to such property. As to the self-acquisitions of males, as the decisions are directly in point and they ought not, in our opinion, to be followed, we refer to the Full Bench the question whether the separate property of a member of a tarwad lapses to the tarwad or is inherited by his tavazhi, *i.e.*, his brothers, sisters and their descendants.

The case again came on for hearing in due course before the Full Bench constituted as above.

P. R. Sundara Ayyar for appellants.

K. R. Subrahmania Sastri for first, tenth, twelfth to fourteenth respondents.

C. V. Anantakrishna Ayyar for second respondent.

The Court expressed the following opinion :—

OPINION (The Chief Justice).—There can, I think, be no question that the principle of the decision in *Kallati Kunju Menon* v. *Palat Erracha Menon*(1) is opposed to the later developments of the Hindu law, and it may well be that it is not in harmony with the sentiments of the people who are governed by the Marumakkatayam law. I appreciate the force of the reasons for the alteration of the law which are urged in the order of reference. But the order of reference in effect asks us to overrule a decision which was given as long ago as 1863, and which, I think I am right in saying, has always been followed by this Court. In a case which came before Sankaran-Nair, J., and myself as recently as March 1908 (Second Appeal No. 784 of 1905) we observe that it is now too late to question the decisions in accordance with which the separate property of a

(1) (1864-65) 2 M.H.C.R., 162.

member of a Tarwad lapses on the death of that member to the Tarwad.

In these circumstances I am apprehensive as to the effect of an alteration of the law by judicial pronouncement. It seems to me its effect might be to unsettle titles which for many years have been thought to be secure, and to open a wide door to litigation in Malabar. If this result were to ensue the evils might well outweigh the advantage of bringing the law into harmony with the wishes of the people. I think this is a case in which we should act on the maxim *stare decisis*, and that if the law is to be altered it should be altered by the legislature which can make due provision for the safeguarding of vested interest and existing titles.

The question on which our opinion is asked is limited to the self-acquisition of males. I am of opinion that the separate property of a member of a Tarwad lapses to the Tarwad.

MILLER, J.—I am a party to the order of reference and do not think it necessary to say much.

I am not prepared to accept Mr. Subrahmania Sastri's contention that Holloway, J., in *Kallati Kunju Menon* v. *Palat Erracha Menon*(1) founded his statement of the law on the view that the Tarwad takes the self-acquired property of a deceased member as his heir. It seems a clear inference from his nearly contemporaneous decision in *Varadiperumal Udaiyan* v. *Ardanari Udaiyan*(2) that that was not his view, and I have no doubt that if he viewed the Tarwad in the light of an heir he would have made that clear. He would not have used those words of doubtful import, 'lapse' and 'fall to the management of the eldest surviving male.'

The judgment in *Palikandy Mannan* v. *Palikandy Kilappen*(3) proceeds on the view which I take of those decisions.

The subsequent cases establish the position that, if the Tarwad takes, it takes as heir, but in none of them was it necessary for the Court to decide as between the tarwad on the one hand and the tavazhi of the deceased on the other. The decisions support Mr. Subrahmania Sastri's case because they take the rule from *Kallati Kunju Menon* v. *Palat Erracha Menon*(1) as correct and in some cases as in *Komu Nair* v. *Ittatha Amma*(4) say that another

(1) (1864-65) 2 M.H.C.R., 162, 163. (2) (1862-63) 1 M.H.C.R., 412.
(3) S.A. No. 534 of 1878 (unreported). (4) (1900) 10 M.L.J., 57.

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rule is wrong, but in all the cases the Court might have reached the result which it did reach without deciding the question.

What all these cases decide is as I have said that the separate property of a member of a tarwad goes to his heir, and the question is who is the heir. The decisions in *Kallati Kunju Menon* v. *Palat Erracha Menon*(1) do not decide that question because they evidently proceed on a different principle, and in none of the succeeding cases was it necessary to decide it for the purpose of the decree. It is suggested that the cases of *Kallati Kunju Menon* v. *Palat Erracha Menon*(1) decide the point by implication, being based upon the usage of Malabar, but there is nothing in the judgments to show that the matter was dealt with as one of well-known or proved customary practices.

There is thus no case deciding after discussion of the question that the Tarwad is the customary heir, no reason why a man's heir in Malabar should not be his nearest of kin as kinship is there understood, and on the contrary there are the opinions of Messrs. Cook and Strange prior to the decisions in *Kallati Kunju Menon* v. *Palat Erracha Menon*(1) to support the view that the Tavazhi is the heir and not the Tarwad.

Mr. Subrahmania Sastri drew a dismal picture of the difficulties to be encountered in giving effect to the heirship of the Tavazhi, but it seemed to me that the difficulties he depicted are not insurmountable. The people of Malabar may take a lesson from their neighbours in South Canara if they find the matter too difficult for their own capacity.

It was suggested in Second Appeal No. 784 of 1905 that it is now too late to question the law in the accepted cases, and if it were clear that it has been accepted by the people and acted on in their daily life there would be much to be said in favour of leaving these cases undisturbed: but, as the order of reference shows, Malabar Judges have from time to time supported the other view which was acted upon even in Mr. Holloway's time by a Karnavan misled, as Mr. Holloway thought, by a "very prevalent fallacy"—a fallacy which endures as a strong body of opinion to the present day.

My answer to the question referred must be that the separate property of the member of a Tarwad is inherited by his Tavazhi.

(1) (1864-65) 2 M.H.C.R., 162, 163.

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ABDUR RAHIM, J.—The question on which our opinion is sought whether the separate property of a male member of a tarwad lapses on his death to the tarwad or is inherited by his tavazhi admits to my mind of no doubt as to how it is to be answered, and the answer must be given in favour of the tarwad. The order of reference it will be seen uses the word 'lapse' in indicating the basis of the tarwad's claim and the word 'inheritance' with reference to the claim of the tavazhi and Mr. Sundara Ayyar who appeared for the appellant tavazhi rested the main strength of his argument on the alleged difference in the nature of the two rival claims. Upon this aspect of the argument I shall have something more to say presently, but I may observe now that the real question is what is the rule according to the Malabar law regulating the devolution of the self-acquisition of a deceased member of a tarwad, and it can make little difference on what theory you choose to base the rule itself if one exists. If we were for the first time deducing a rule of succession in such cases by some process of *a priori* reasoning based on the analogy of other systems of law or on our own notions of the fitness of things such arguments as Mr. Sundara Ayyar has addressed to us might be relevant. But admittedly the Malabar law provides for the devolution of a Nayar's property and all that we have to determine is whether the course of devolution is as contended for by the appellants or the respondents. And if the statement of the law on the subject as contained in the decisions of this Court is any guide to us, the point cannot be said to be left in doubt. The Marumakkatayam law to which the question appertains is entirely customary law, for, as stated by Holloway and Kindersley, JJ., in *Wannathan Kandie Chiruthai* v. *Keyakaadath Pydel Kurup*(1) "if Malabar law is a branch of Hindu law it is one put out or separated from the parent stem before the present form of Hindu law existed"; and Their Lordships of the Privy Council in *Raman Menon* v. *Raman Menon*(2) observe that there are no sacred writings among the Nayars having legal authority and their law is wholly based on the usages of the people. In the last-mentioned case the Judicial Committee proceed further to point out that some of those usages are so well established as to be judicially noticed without proof while others of them are still

(1) (1870-71) 6 M.H.C.R., 194. (2) (1901) I.L.R., 24 Mad., 73 at p. 80.

in that stage in which proof of them is required before they can be judicially recognized and enforced. Now, if we find that ever since 1863 this Court has laid down in a series of cases that the self-acquired property of a member of a tarwad devolves on his death upon the tarwad, I think we are bound to treat this as a very cogent proof of the law of Malabar on the point, for otherwise it would not have been judicially noticed. It may, however, be open to a party to raise the question that such was never in fact the law but was erroneously assumed to be so by the Courts, or that though the rule had force at one time a different rule has since been adopted by the people or that in particular families some other mode of succession has prevailed. A person making such an allegation must make it out by clear and sufficient evidence and needless to say the burden which he has to discharge is a peculiarly heavy one.

In 1863 which so far as the present question is concerned is substantially the starting date of judicial authority, Phillips and Holloway, JJ. (*Kallati Kunju Menon* v. *Palat Erracha Menon*(1)), held that 'the self-acquisitions of land by a member of a tarwad are his separate property . . . . After his death they lapse into the tarwad property.' In 1864 Scotland, C.J., and Holloway, J., in *Kallati Kunju Menon* v. *Palat Erracha Menon*(1), say "it is unquestionably the law of Malabar that all acquisitions of any member of a family undisposed of at his death form part of the family property (*i.e.*, tarwad property), that they do not go to the nephews of the acquirer but fall as all other property does to the management of the eldest surviving male (*i.e.*, the Karnavan of the tarwad)." I have inserted the explanatory words within brackets in accordance with what was conceded at the bar. In 1878 in *Palikandy Mannan* v. *Palikandy Kelappan*(2), referred to in the order of reference, Innes and Muthusami Ayyar, JJ., expressed their opinion that the tarwad takes by survivorship the self-acquisitions of one of its members. In 1881 Turner, C.J., and Muthusami Ayyar, J., (*Vira Rayen* v. *Valia Rani Pudia Kovilagom, Calicut*(3)), held that according to the custom prevailing in the family of the Zamorin Rajas of Calicut who are the heads of the people following the Marumakkatayam

(1) (1864–65) 2 M.H.C.R. 162 at p. 163.
(2) S.A. No. 534 of 1878 (unreported). (3) (1878–81) I.L.R., 3 Mad., 141.

system the self-acquired property of the holder of a stanom (an office of dignity) becomes on his death the property of the Kovilagom (which corresponds I take it to an ordinary tarwad) in which he was born. This case to my mind is significant as furnishing some evidence of usage on the point in dispute. In 1881 Turner, C.J., and Hutchins, J., (*Kanara Paniker* v. *Ryrappa Paniker*(1)), while referring to an opinion which prevailed to the effect that the self-acquisitions of an individual member descended to his own representative (meaning perhaps his brothers or sisters) state that the opinion has been held to be erroneous but do not suggest that it has been so held wrongly. In 1881 Innes and Muthusami Ayyar, JJ., (*Ryrappan Nambiar* v. *Kelu Kurup*(2)), held that on the death of a member of a tarwad his self-acquired property lapses into the property of the tarwad but that it remains liable as assets of the deceased for the payment of his debts. In 1884 Turner, C.J., and Muthusami Ayyar, J., (*Antamma* v. *Kaveri*(3)), dealing with the case relating to a family following the Alyasantanam law which resembles in many respects the Marumakkatayam law refers to the rule governing succession to the self-acquired property of a member of a Malabar tarwad as laid down in *Kallati Kunju Menon* v. *Palat Erracha Menon*(4) without suggesting any doubt as to the correctness of the rule. In 1888 Kernan and Muthusami Ayyar, JJ., (*Alami* v. *Komu*(5)), while discussing the question whether the last surviving member of a tarwad can validly dispose of the tarwad property by will, assume it to be the settled law that on the death of a member of a tarwad his self-acquisition devolved on the tarwad. In 1891 Collins, C.J., and Handley, J., (*Parathi Mathu* v. *Parivanunichathan*(6)), say that the assets of a deceased member of a tarwad would be taken by the tarwad subject to the payment of his debts. In 1893 before Collins, C.J., and Shephard, J., in the case of *Illikka Pakramar* v. *Kutti Kunhamed*(7), concerning succession to the self-acquired property of a Mopla woman it was taken for granted that if she was governed by the Malabar law the property would go to her tarwad. In 1899 Subrahmania Ayyar and Moore, JJ., (*Komu Nair* v. *Ittiatha Amma*(8)), in laying down that the self-acquisitions of a member

(1) (1878–81) I.L.R., 3 Mad., 212. (2) (1882) I.L.R., 4 Mad., 150.
(3) (1884) I.L.R., 7 Mad., 575. (4) (1864–65) 2 M.H.C.R., 162 at p. 163.
(5) (1889) I.L.R., 12 Mad., 126. (6) S.A. No. 1595 of 1889 (unreported).
(7) (1894) I.L.R., 17 Mad., 69. (8) (1900) 10 M.L.J., 57.

of the Malabar tarwad devolved on his death, not upon his heirs (meaning his sisters and their children), but upon the tarwad, express their surprise that the Subordinate Judge in the lower Appellate Court being a man of particularly lengthened experience should have fallen into the mistake of holding to the contrary.

Thus there can be no question that since the rulings in *Kallati Kunju Menon* v. *Palat Erracha Menon*(1) to both of which Holloway, J., who, I understand, possessed particular acquaintance with the Malabar law, was a party, all the Judges of the Court who have had occasion to express an opinion on the point accepted his statement as containing a correct exposition of the law. Before those decisions however, Mr. Cook in 1852 as Sub-Judge of Calicut had said that according to the law of nepotism a nephew might be heir to a Karnavan's property, and Mr. Justice Strange in his Manual on 'Hindu Law' also before the date of the rulings in *Kallati Kunju Menon* v. *Palat Erracha Menon*(1) expressed an opinion that a man's nephews and nieces succeeded to his movable property. Allowing full weight to the views so expressed in a guarded or qualified form by Strange, J., and Mr. Cook, they cannot be taken in face of the concurrence of judicial opinion which has since prevailed in a contrary sense for the space nearly of half a century, to throw any doubt upon what the general Malabar law is on the point. Those views might well be accounted for if they referred to the practice obtaining in certain particular families following a rule of their own in this matter and such a practice might also have found favour with the more advanced section of the people of Malabar desirous of bringing themselves into a line with other peoples. And that is the inference to which I have been led by the observations of Turner, C.J., and Hutchins, J., to which reference has already been made and by what Mr. Moore who was also a Judge of this Court says in his treatise on 'Malabar Law and Custom' a book which is constantly referred to as an authority on all questions relating to institutions peculiar to the people of Malabar. He says at page 176 (3rd edition): "The rule laid down in the case already quoted (meaning the case in *Kallati Kunju Menon* v. *Palat Erracha Menon*(1)), which is the leading case on the subject is undoubtedly in accordance with the ancient usage

(1) (1864-65) 2 M.H.C.R., 162 at p. 163.

which regarded the family as an indissoluble unit and took no thought of the individuals composing that unit. A practice however appears to have sprung up of allowing self-acquired property to pass to the nearer heir in preference to the head of the family," and further on he states "Traces of the practice alluded to by Mr. Justice Strange and Mr. Cook still occasionally come into the notice of the Courts" and cites a case in which the rule of succession now contended for was found to be proved by the District Munsif. Mr. Mayne in his 'Hindu Law,' section 241 (6th edition), also lays down "According to the existing Malabar law a member of a tarwad may make separate acquisitions and dispose of them as he pleases during his life; but anything that remains undisposed of at his death becomes part of the family property." I might note here that reliance is placed in the order of reference upon the evidence of some witnesses who were examined before the Malabar Marriage Commission as supporting the view in favour of the appellants' claim but I need hardly point out that such statements cannot do away with the necessity of proving by evidence adduced in the case that the law of Malabar is not as laid down by the Courts. I may also observe that it was stated by the learned vakil who appeared for the respondents that other witnesses examined by the Commission expressed views which supported his clients' case.

I shall now briefly notice Mr. Sundara Aiyar's arguments by which he tried to make out that the view of the law embodied in *Kallati Kunju Menon* v. *Palat Erracha Menon*(1) and corroborated afterwards by repetition in subsequent cases is wrong. He first of all urges that according to the law of nepotism which prevails among the Nayars a man's heirs are his nephews and nieces and therefore if a different rule of inheritance is sought to be established with reference to the self-acquisitions of a Nayar who is a member of a tarwad it must be proved to be founded on especial usage. But this argument overlooks the fact that the system of holding property through the tarwad is at least as well established among the people of Malabar as the fact that their general law of inheritance is founded on the rule of nepotism. And I think it can hardly be disputed that the tarwad system of enjoying property is in full vigour at the present day as

(1) (1864-65) 2 M.H.C.R., 162

instances of rich tarwads consisting of numerous members constantly come to our notice. If the self-acquisitions of the members of the tarwad descended as a rule to their immediate relations to the exclusion of the tarwad the result in all likelihood would be that very few tarwads would be left. This consideration fortifies me in thinking that the rule of succession in such cases as recognized by so many experienced Judges of this Court must be well-founded in the usage of the people.

It is next argued that even if the rule in favour of succession by the tarwad did prevail at one time it should no longer hold good as it has been held that the member of a tarwad has during his life-time full powers of disposition over his self-acquisitions and it cannot therefore be said that the tarwad takes the property by lapse or survivorship. No doubt the use of the words 'lapse' and 'survivorship' points to a stage in the growth of the Marumakkatayam system when the tarwad had an interest in the self-acquired property of one of its members, but I do not find it difficult to conceive that though this may serve to explain its origin the rule in favour of succession by the tarwad might have survived the state of things which gave rise to it. For in the nature of things we must not look for strict logical consistency in the development of customary law such as that of Malabar. Though it may not now be quite logical to speak of the tarwad's succession as by survivorship or lapse there can be no doubt as to the rule which the Courts meant to lay down, for Mr. Justice Holloway himself while affirming the right of the tarwad holds that during his life-time the acquirer is fully entitled to dispose of his self-acquisitions.

The learned vakil for the appellants complained of great hardship if the claim of the tarwad was preferred to that of the tavazhi and indeed he used stronger language saying that it would be unreasonable to hold in favour of the tarwad's claim. But he has failed to convince me that his complaint is well-founded not that considerations of hardship even if well-founded would in any way affect the question. A tarwad, however remote the relationship of some of its members may be, is undoubtedly the natural family of a follower of the Marumakkatayam system, who is born and brought up there and is entitled as long as he lives to be maintained and to have all his legitimate expenses paid out of the tarwad property and enjoys whatever other

advantages the membership of such a corporation might afford. How can it therefore be unreasonable to say that the property of a Nayar should devolve on his death upon the tarwad. On the other hand I should consider it eminenthy reasonable and in the fitness of things for a people whose social life is so moulded to adopt such a rule regulating the succession to their property. It is said however that a Nayar is bound to his tavazhi by closer ties of relationship than to his tarwad. That might be so generally but at the same time the statement would not hold good with reference to each individual member of a tarwad and of a tavazhi. The tavazhi is the name for a group of relations consisting of a man's brothers, sisters and their descendants as stated in the order of reference and would not include his mother and grand-mother nor their brothers and sisters and their children all of whom however would belong to the man's tarwad which comprises all the descendants of a common female ancestor ranging from the nearest to the most remote. When the competition therefore is between the tarwad and the tavazhi I should find it difficult to affirm with any certainty that a Nayar would be apt to regard for instance his sisters as having greater claims upon him than his mother. However that may be I feel myself bound to hold that the law on the point in dispute is as laid down by the Judges of this Court from the day of Holloway, J., onwards.

I am also of opinion that though in the cases quoted the present question was not the one brought up for actual decision still as it was necessary to come to a decision upon it in order to reach the conclusion arrived at by the learned Judges the controversy falls within the principle expressed by the Judicial Committee in *Chotay Lall* v. *Chunnoo Lall*(1) where they observe "The Courts ought not to unsettle a rule of inheritance affording a long series of decisions unless it is manifestly opposed to law and reason." The danger is obvious of overruling at the present day the decisions which have laid down the law in favour of succession by the tarwad and as I have said I am not satisfied that the rule so enunciated is wrong. I need scarcely observe that if the matter had been *res integra* I would have hardly ventured on such a question to express dissent from my learned brethren Miller and Sankaran-Nair, JJ., but having regard to the

(1) (1879) I.L.R., 4 Calc., 744 at p. 755.

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authorities the only possible answer in my opinion is that which I suggested.

The second appeal again came on for hearing before (*Miller* and *Sankaran-Nair, JJ.*) when the Court delivered the following judgment.

JUDGMENT.—In accordance with the decision of the Full Bench we must hold that of the property acquired by Paru Amma and Krishnan Nair, so much as belonged to the latter at his death lapsed to the tarwad. There remain three further questions to be dealt with. First we find ourselves unable to say that there is no evidence to support the finding of the Subordinate Judge that the property in question was not given to Paru Amma and Krishnan Nair by the former's husband Sekhara Menon, and that being so we are bound to accept that finding. The second question is how the property acquired by Paru Amma and Krishnan Nair was held by them. On Paru Amma's death did it all become the property of Krishnan Nair as her survivor, or did her share devolve on all her children?

We have not been referred to any authority directly deciding this question. The cases which have decided that gifts by a man to his wife and her children are held by the donees with the incidents of tarwad property cannot apply to the present case. Whatever be the foundation on which those decisions rest, it is clear that an acquisition such as we are dealing with made by two persons jointly cannot be presumed at any rate as a rule to have been made with any intention in the acquirers of forming anything resembling separate tarwad for the purpose of holding the property acquired. Here there is no reason for supposing that Paru Amma intended this property to go on her death to her son Krishnan Nair to the exclusion of her other children, and, as we have said, there are no decisions, nor do we know of any usage in Malabar, which would require us to hold that as a matter of law such must be the course of devolution. We think then when property is acquired by two persons who may be members of a tarwad, the intention of the acquirers must be presumed in the absence of evidence to the contrary to have been to hold that property in shares, and that in the present case Paru Amma's share did not pass to Krishnan Nair by survivorship on her death. We have already decided that the heirs of Paru Amma are her own children and not her tarwad, and the result is therefore

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that one half of the property in possession of the plaintiffs is held by them as their own and the remainder is to be treated as property allotted to them by their tarwad for their maintenance. The last question is whether the plaintiffs are entitled to anything more for their maintenance, and having regard to the circumstances of the family as found by the lower Courts, we think we may allot them forty paras a year to be paid by the karnavan out of the tarwad funds. We modify the decree accordingly and direct that the parties bear their own costs throughout.

APPELLATE CIVIL—FULL BENCH.

Before Sir Arnold White, Chief Justice, Mr. Justice Sankaran-Nair and Mr. Justice Pinhey.

GOVINDA PILLAI (PLAINTIFF), APPELLANT,

v.

THE TALUK BOARD, KUMBAKONAM (DEFENDANT), RESPONDENT.*

1908. April 29, 30. May 6. August 13, 25.

Local Boards Act (Madras) V of 1884, s. 156 (1) (3)—No notice necessary in suits for injunction under s. 156 (1) as amended—Period of limitation prescribed in s. 156 (3) not applicable to such suits.

Section 156 (1) of the Madras Local Boards Act V of 1884, as amended, does not apply to suits brought for an injunction and the notice prescribed therein is not necessary in the case of such suits.

Mahamahopadyaya Rungachariar v. *The Municipal Council of Kumbakonam*, [(1906), I.L.R., 29 Mad., 539], followed.

The period of limitation prescribed in section 156 (3) applies only in the case of suits falling within section 156 (1) and suits for injunction being outside the scope of section 156 (1), do not for purposes of limitation fall within section 156 (3).

The amendment of section 156 in 1897 was not intended to alter the law previously laid down in decided cases.

SECOND APPEAL against the decree of T. T. Rangachariar, Subordinate Judge of Kumbakonam, in Appeal Suit No. 51 of 1905, presented against the decree of S. Authynarayana Ayyar, District Munsif of Valangiman, in Original Suit No. 111 of 1904.

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* Second Appeal No. 1268 of 1905.

The facts are thus set out in the judgment of the lower Appellate Court which was as follows :—

"The suit is for a perpetual injunction to restrain the defendant, the Taluk Board, Kumbakonam, from interfering with plaintiff's enjoyment of the plaint land.

"The defendant contends, among other things, that the suit is barred by the provisions of section 156 of the Madras Local Boards Act; that it is not sustainable for want of a notice under section 424 of the Code of Civil Procedure; that it is barred by lapse of time, and that the Government should be made a party therein.

"The District Munsif dismissed the suit."

"Plaintiff appeals."

"Section 156 of the Madras Act V of 1884 was considered in the decision in I.L.R., XVI Mad., 317. In that decision, it was observed that the cases contemplated in that section are suits for compensation and for damages, and not suits whose object was a declaration of title to immoveable property or for an injunction to restrain interference with immoveable property. But the same section in Madras Local Boards Act as subsequently amended by Act VI of 1900, consists of four clauses and the wording of the third clause clearly shows that all actions relating to immoveable property were meant to be included in the action contemplated in clause (1). Clause (3) declares that the ordinary law of limitation will apply to suits for recovery of immoveable property and for a declaration of title thereto and that the special provision referred to therein will apply to all other kinds of suits including a suit for an injunction to restrain interference with immoveable property. Therefore, I cannot see how the appellant could have commenced this action without giving to the respondent the written notice referred to in clause (1). I consider that the District Munsif's decisions on first and fourth issues are correct.

The appeal fails and is dismissed with costs."

The plaintiff appealed to the High Court.

The second appeal first came on for hearing before (Sir Arnold White, C.J. and Benson, J.) who made the following order of reference to a Full Bench.

ORDER OF REFERENCE TO A FULL BENCH.—Two questions arise for determination in this appeal :

(1) Does sub-section (1) of section 156 of the Local Boards Act, 1884, apply to a suit for an injunction ?

(2) Is the six months' limitation prescribed by sub-section (3) of that section applicable in the case of a suit for an injunction ?

On principle it would seem that the limitation prescribed by sub-section (3) should only apply in the case of suits for which notice of action is required by sub-section (1).

This Court held in *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam*(1) that sub-section (1) of section 261 of District Municipalities Act, 1884, did not apply when the suit was for an injunction. Sir Subrahmania Ayyar, J., however, did not discuss the effect of the amending words introduced into sub-section (3), and Miller, J., seemed doubtful as to the proper construction of this sub-section.

Whilst we should be disposed to hold that the six months' limitation prescribed by sub-section (3) only applies in the case of suits for which notice of action is necessary under sub-section (1), the language of the sub-section makes it doubtful whether it can be so construed.

We accordingly refer to a Full Bench the following questions :—

Is notice of action necessary under section 156 (1) of the Local Boards Act, 1884, when the suit is for an injunction.

Does the six months' limitation prescribed by section 156.(3) apply to such a suit ?

The case again came on for hearing in due course before a Full Bench constituted as above.

T. V. Seshagiri Ayyar for appellant.

K. Ramachandra Ayyar for respondent.

The Court expressed the following opinion :—

OPINION (SIR ARNOLD WHITE, C.J.).—The two questions which have been referred to us are—

"(1) Is notice of action necessary under section 156 (1) of the Local Boards Act, 1884, when the suit is for an injunction ?"

"(2) Does the six months' limitation prescribed by section 156 (3) apply to such a suit ?"

I take it that, for the purposes of our answer to the questions which have been referred to us, it is to be assumed that the suit

(1) (1906) I.L.R., 29 Mad., 539.

for an injunction is on account of an act done, or purporting to be done, in pursuance, or execution or intended execution of the Act, or in respect of an alleged neglect or default in the execution of the Act within the meaning of section 156 of the Madras Local Boards Act (V of 1884).

As regards the first question, it was held by this Court in *President of the Taluk Board, Sivaganga* v. *Narayanan*(1) that, under the provisions of section 156 of the Local Boards Act V of 1884 *as originally enacted*, the section did not apply to a suit for an injunction. I think this decision was right. Section 156 *as originally enacted* would seem to be taken from section 264 of the English Public Health Act, 1875 (38 and 39 Vict., C. 55), and it has been held that that enactment and similar enactments with regard to notices against public authorities (now superseded by the Public Authorities Protection Act, 1893, 56 and 57 Vict., C. 61), were intended to apply to an action for damages, and that notice was not necessary in the case of a suit for an injunction to restrain an immediate injury. See *Flower* v. *Local Board of Low Leyton*(2), *Attorney-General* v. *Hackney Local Board*(3), *Sellors* v. *Matlock Bath Local Board*(4), *Chapman, Morsons & Co.* v. *Guardians of Auckland Union*(5).

The principle of these decisions has been applied in the Indian cases cited in the judgment in *President of the Taluk Board, Sivaganga* v. *Narayanan*(1). In the judgment in that case the Judges observed that the cases contemplated by the section of Act V of 1884, as originally enacted, are suits for compensation and for damages and the principle is to allow public bodies time for tender of amends to the parties so as to avoid litigation. See also *Syed Ameer Sahib* v. *Venkatarama*(6), and *Srinivasa* v. *Rathnasabapathi*(7), *Shidmallappa* v. *Gokak Municipality*(8).

By the Act of 1890, section 156 of the Act, V of 1884, was amended by adding after the words "explicitly stating the cause of action," the words "the nature of the relief sought, the amount of compensation claimed." At the same time the section was further amended by adding sub-section (2) for the words "and

(1) (1893) I.L.R., 16 Mad., 317. (2) (1877) L.R., 5 Ch. D., 347.
(3) (1875) L.R., 20 Eq., 626. (4) (1885) L.R., 14 Q.B.D., 928.
(5) (1889) L.R., 23 Q.B.D., 294. (6) (1893) I.L.R., 16 Mad. 296.
(7) (1893) I.L.R., 16 Mad., 474. (8) (1898) I.L.R., 22 Bom., 605.

every such action shall be commenced within six months next after the accrual of the cause of action and not afterwards." In support of the contention that notice of action was necessary in the case of a suit for an injunction it was argued that reading the enactment as amended in sub-section (1) by the light of the new sub-section (3) notice of action was only dispensed with in the case of an action for the recovery of immoveable property or for a declaration of title thereto and that the present action being a suit in which neither of these reliefs was claimed, notice of action was necessary. I cannot accede to this contention. I think the words "the nature of the relief sought, the amount of compensation claimed" were introduced in order to make it clear that the Legislature recognised and accepted the rule of law laid down in the authorities to which I have referred.

The question of the construction of the amended section 261 of the Madras District Municipalities Act (IV of 1884), which is the same as the amended section 156 of the Madras Local Boards Act came before this Court in *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam*(1), and it was held that the notice required by the section was not necessary when the suit was for an injunction. Sir Subramania Ayyar, J., said "Next, as regards the question of notice, I may deal with it quite shortly. Suits referred to in clause (1) of section 261 are, by its very terms, those which relate to acts 'done or purporting to be done,' whereas, a claim for an injunction is with reference to what it is apprehended will be done in the future. It would not be right to impute to the Legislature an intention to insist upon the lapse of the interval involved in the provision as to notice even in regard to cases where such lapse might be attended with the completion of the threatened injury, the prevention of which is the very aim and end of the suit. *Cf. Kirk* v. *Todd*(2)." The learned Judge would seem to have been of opinion that a suit for an injunction is necessarily outside the scope of the section since it has reference to what it is apprehended will be done in the future. However this may be, one thing seems clear and that is, that the learned Judge was of opinion that the amendment had not altered the law as laid down in decided cases. Miller, J., said "Before the amendment made by Act III of 1897,

(1) (1906) I.L.R., 29 Mad., 539. (2) (1882) L.R. 21 Ch.D., 484.

sections similar to section 261 in other laws were held on general principles not to apply to suits for an injunction; and whatever be the proper construction of sub-section (3) to section 261, added by the Act of 1897, that sub-section does not seem to me to require us to hold that a suit for an injunction is now within the section."

I think this case was rightly decided, and I am of opinion that, when the suit is for an injunction, notice of action is not necessary.

As regards the second question, I am of opinion that when the suit is for an injunction, the six months' limitation provided by the new sub-section (3) does not apply. It seems to me the governing words are "such as is described in sub-section (1)." The suit described in sub-section (1) is a suit for which notice of action is necessary. The words of the section, as originally enacted, are "every such action" that is, as I read the section, every action for which notice of action is necessary; and the substitution of the words "such as is described in sub-section (1)" for "such action" can make no difference.

As a suit for an injunction is not in my opinion an action "such as is described in sub-section (1)," sub-section (3) does not apply to such an action.

I think the intention of the Legislature was that the class of suits for which notice of action is necessary should be co-extensive with the class of suits to which the six months' limitation applies. The learned authors of Darby and Bosanquet on the Statutes of Limitations (Supplement to second edition, p. 592) observe:—"Most of the statutes that provide a special period of limitation also at the same time make notice of action necessary, and the decisions on the question whether a person sued is entitled to notice of action are of course decisions on the question whether such a person is entitled to the benefit of the special period of limitation prescribed by the Act." By a parity of reasoning the converse proposition would seem to be good, *viz.*, that where notice of action is not necessary the special period of limitation does not apply.

The explanation of the words "unless it is an action for the recovery of immoveable property or for a declaration of title thereto" in sub-section (3) would seem to be that when the section was amended the Legislature was prepared to accept the view

taken by the Bombay High Court in *Nagusha* v. *Municipality of Sholapur*(1), decided in 1892, *viz.*, that a suit in ejectment fell within the provisions of the corresponding enactment of the Bombay Act. This case, however, was overruled by the majority of a Full Bench of the Bombay High Court in *Manohar Ganesh Tambekar* v *Dakor Municipality*(2). In *Syed Alli Sāheb* v. *Chairman of the Salem Municipality*(3), this Court took the same view as the majority of the Judges of the Full Bench in Bombay.

I think our answer to both the questions which have been referred to us should be in the negative.

Sankaran-Nair, J.—I agree.

Pinhey, J.— I concur. I am of opinion that it was not the intention of the Legislature to change the law and that the words in sub-section (3) "unless it is an action for the recovery of immoveable property or for a declaration of title thereto" were added not for the purpose of bringing such actions within the scope of section 156, clause 1, but for the purpose of excluding such actions from the scope of sub-section (3) in case the Madras High Court should follow the decision in *Nagusha* v. *Municipality of Sholapur*(1), and hold that they did all within section 156, sub-section (1).

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Pinhey.

NANA TAWKER (PLAINTIFF), APPELLANT,

v.

RAMACHANDRA TAWKER AND ANOTHER (DEFENDANTS), RESPONDENTS.*

1908. October 1, 2. November 17.

Hindu law—Succession—Undivided son succeeds to father's self-acquired property, to the exclusion of divided son.

Under the Law of the Mitakshara on the death of a father leaving self-acquired property, an undivided son takes such property to the exclusion of a divided son, although the division took place after the acquisition of such property by the father.

(1) (1894) I.L.R., 18 Bom., 19.
(2) (1898) I.L.R., 22 Bom., 289.
(3) (1893) 3 M.L.J., 223.

* Second Appeal No. 86 of 1906.

MUNRO AND PINHEY, JJ.

NANA TAWKER v. RAMA-CHANDRA TAWKER.

Fakirappa v. Yellappa, [(1898) (I.L.R., 22 Bom., 101)], referred to.

Although the sons have by birth theoretically an interest in their father's self-acquisitions, still as the father can dispose of those acquisitions at pleasure, they are not coparcenary property in the ordinary sense and it is only the latter property that can form the subject of partition. After obtaining on partition his share of all the divisible property, the separating son loses all the rights which he had as a member of the coparcenary and it was only as a member of the coparcenary that he had by birth an interest in his father's self-acquisitions. All the right that remains to him with regard to his father's property is the right to inherit in the absence of undivided sons.

An undivided son takes his father's separate property by survivorship and it becomes an addition to the joint property.

SECOND APPEAL against the decree of H. Moberly, District Judge of Tanjore, in Appeal Suit No. 978 of 1904, presented against the decree of C. G. Kuppuswami Ayyar, Subordinate Judge of Tanjore in Original Suit No. 22 of 1903.

The facts of this case are sufficiently stated in the judgment.

The Hon. the Advocate-General for appellant.

K. Srinivasa Ayyangar for first respondent.

JUDGMENT.—The suit was for a declaration that the plaintiff alone was entitled to execute the decree in Original Suit No. 21 of 1901 on the file of the Subordinate Judge's Court of Tanjore, and that the plaintiff was entitled to succeed to items Nos. 2 to 5 of the plaint schedule. The plaintiff also prayed for possession of item No. 2. The plaintiff and the first defendant are the sons of one Jagannatha Tawker, deceased, and the second defendant is their mother. The decree in Original Suit No. 20 of 1901 was obtained by Jagannatha Tawker against one Venkatesa Bhat, and in respect of it Venkatesa Bhat paid Rs. 3,000 into Court. The Subordinate Judge found that the plaintiff and his father Jagannatha Tawker were living together as an undivided family and that the first defendant was a divided member; that the sum of Rs. 3,000 deposited in Court was the self-acquisition of Jagannatha Tawker, and that therefore the plaintiff and the first defendant were jointly entitled to execute the decree in Original Suit No. 20 of 1901 above mentioned; that the plaintiff was alone entitled to items Nos. 3 to 5 of the plaint schedule; and that the plaintiff and the first defendant were jointly entitled to the house (item No. 2), but that the second defendant should not be ejected therefrom in her lifetime. Against the decree of the Subordinate Judge the plaintiff appealed to the District Court.

MUNRO AND PINHEY, JJ.

NANA TAWKER v. RAMA-CHANDRA TAWKER.

From the appellate judgment it appears that the only point pressed was that the amount paid into Court by Venkatesa Bhat in Original Suit No. 21 of 1901, and the house (item No. 2) belonged to the plaintiff solely and not to the plaintiff and the first defendant jointly. The District Judge found that the said amount and the house were the self-acquisition of Jagannatha Tawker, and that on his death his two sons became entitled to them jointly. It does not appear that any attack was made on the finding of the Subordinate Judge that the plaintiff and Jagannatha Tawker were joint, and that the first defendant was divided from them. The District Judge appears to have accepted that finding, but to have held nevertheless that the undivided son and the divided son were equally entitled to succeed to their father's self-acquisition. The only question for determination in this second appeal, which is by the plaintiff, is whether the District Judge was right in so holding, and the only other fact which need be mentioned is the undisputed fact that the properties in dispute were acquired before the first defendant became divided.

Fakirappa v. *Yellappa*(1) seems to be the only reported case in which the present question has been directly dealt with. The contest there was between united sons and a divided grandson, and it was held that the former took, in preference to the latter, the property, both ancestral and self-acquired, left by the grandfather. In that case, as in the present case, the self-acquired property had been acquired by the grandfather before the division by which one member left the family.

The only cases in this Court to which our attention has been drawn are *Ramappa Naicken* v. *Sithammal*(2) and *Marudayi* v. *Doraisawmi Karambian*(3), the former being cited for the appellant and the latter for the respondent. What was actually decided in *Ramappa Naicken* v. *Sithammal*(2) was that when the only surviving heirs to a Hindu father were a divided son and the father's widow, the divided son succeeded to the father's estate in preference to the widow. Ranade, J., commenting on this case in *Fakirappa* v. *Yellappa*(1) observes as follows:—"The judgment, "however, shows clearly that if there had been united sons living

(1) (1898) I.L.R., 22 Bom., 101. (2) (1878-81) I.L.R., 2 Mad., 182.
(3) (1907) I.L.R., 30 Mad., 348.

MUNRO AND PINHEY, JJ.

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"at the death of the father, they would have succeeded in prefer-"ence to their separated brothers." This comment goes perhaps too far as in the judgment of this Court there is reference to competition only between separated sons and sons born after partition. The case where, as here, the conflict is between united sons and separated sons all of whom were alive at the time of partition is not dealt with, though no doubt the result would have been the same.

In *Marudayi* v. *Doraisami Karambian*(1) also the present case did not arise. There the contest was between a divided son and the divided grandsons of the deceased. The only other case relied upon by the respondents' vakil is the *Sivaganga Case*(2). He refers to the remark at page 609 of the report to the effect that self-acquired property, if the acquirer leaves male issue, will descend to that issue, and argues that this implies that sons both divided and undivided are entitled to succeed equally to their father's self-acquisitions. As was remarked in *Fakirappa* v. *Yellappa*(3) where the same argument was advanced, it is clear from the contest that the male issue referred to means those sons who were in union with their father at his death.

It is thus clear that so far as the reported decisions go there is no authority against the appellant's contention while *Fakirappa* v. *Yellappa*(3) is in his favour. The latter case is referred to in Mayne's "Hindu Law," seventh edition, at page 732, and evidently with approval. The learned author remarks upon the case as follows:—"A grandson sued his grandfather and uncles for a "partition. He obtained a decree as to all the joint property, but "failed as to a part which was held to be the separate property "of the grandfather. On the death of the grandfather he "brought a fresh suit for a share of this, contending that by "descent it had become joint property. This was perfectly true, "but the answer to the plaintiff was that he was no longer a "member of the coparcenary. On the grandfather's death his "interest in the joint property passed to the remaining coparce-"ners by survivorship. His own separate property passed to his "united sons as heirs, and in their hands became an addition to "the joint property, in which the divided grandson had no

(1) (1907) I.L.R., 30 Mad., 348.
(2) (1861-64) 9 M.I.A., 543.
(3) (1898) I.L.R., 22 Bom., 101.

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"interest." The same result would, of course, have followed if the claimant had been a divided son.

Clause 27 of section I, chapter I of the Mitakshara—*vide* Stroke's Hindu Law Books, page 475—runs thus:—"Therefore it is a "settled point, that property in the paternal or ancestral estate is "by birth, although the father have independent power in the "disposal of effects other than immoveables . . . . but he is "subject to the control of his sons and the rest, in regard to the "immoveable estate whether acquired by himself or inherited from "his father or other predecessor . . . . " Clauses 9 and 10 of section V of the same chapter are in conflict with the above in that they lay down that a son cannot interfere with his father's disposal of his self-acquired property, although he has a right therein by birth. These clauses were considered by the Privy Council in *Balwant Singh* v. *Rani Kishori*(1), and it was finally decided that a father had full power of disposition over his self-acquired property, moveable or immoveable. But the dictum of the Mitakshara contained in clause 27 of section I of chapter I and in clause 10 of section V of the same chapter that the son has a right by birth in the property of the father whether ancestral or self-acquired does not appear to have been dissented from in any reported case. This being so, the succession to the self-acquired property of the father would, where there was an undivided son, be by survivorship rather than by inheritance, and he who took by survivorship would exclude those, such as divided sons, who could only take in any case by inheritance.

In West and Buhler's 'Hindu Law,' 3rd edition, at page 68, we find the following:—"Sons who have separated from their father "and his family are passed over in favour of sons, who have "remained united with him, or were born after the separation. "This is an application of the principle that a joint and undivided "succession of the descendants being taken as the general rule, "those who have become exceptions to it, or who having been "exceptions have since ceased to be so, are treated accordingly. "Their rights of succession are, as to their mutual extent, their "rights as they would be in a partition made immediately on the "death of the propositus." Referring to the last statement their Lordships in *Marudayi* v. *Doraisami Karambian*(2) remarked

(1) (1893) I.L.R., 20 All., 267.
(2) (1907) I.L.R., 30 Mad., 348.

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that it was probably correct. On this principle it is clear that, inasmuch as, being already divided, he could not claim anything in such a partition the divided son is entitled to no share even in the self-acquired property of the father. For that property immediately on the father's death, becomes joint property and liable to be partitioned among the undivided sons. If the only members of the co-parcenary were the father and one son, that son on the death of the father would, on the above principle, take the whole.

In Sorvadhikaris' 'Law of Inheritance Tagore Law Lectures,' 1880, page 886, it is laid down broadly that "sons legally separated "from their father have not, on his death, any claim to inherit his "property with a son not separated." The same rule is found in Macnaghten's 'Hindu Law,' Vol. II, Precedents of Inheritance, section I, case XII.

The argument that there is no text which says in so many words that the son who has remained undivided succeeds to the father's self-acquisitions to the exclusion of the divided son, may be met by stating that the broad principles of Hindu Law being what they are, there is no necessity for such a text. It may be pointed out however that, for the special case of reunion after partition, the Mitakshara makes provision in chapter II, section 9, and it is clear therefore that reunited sons would take their father's property to the exclusion of the sons who were divided from their father. Similarly in the Vivadachintamani, edition of 1863, at page 304, we find :—"Reunion can also take place between father and son. "It is also proper that the title of sons to the estate of their father "should cease after the division of property, and should revive "after their reunion."

In Vyarastha Chandrika, vol. II, among precedents of partition at page 404 we find it stated that "in a Hindu family, "where a reunion has taken place among certain members after "partition, the members of the reunited family and their descend-"ants succeed to each other to the exclusion of the members of "the unassociated or not reunited branch."

The only opinion opposed to the above which we have been referred to is contained in Sarkar's 'Hindu Law,' 3rd edition, at page 269, where it is stated that a son who is reunited cannot claim preference to another who remains separate. The reasons given by the author for this opinion are not easy of acceptation,

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and it is sufficient to say that we are unable to follow it in view of the strong authority to the contrary.

The rule being as above stated in the case of reunited son there can be no hesitation in apylying the same rule in the case of sons who have never separated.

One final argument requires to be noticed. It is suggested that if sons have by birth an interest in their father's self-acquisitions, and if at the time when a son separates himself there are such self-acquisitions in existence, then inasmuch as at partition the son cannot obtain any share of the self-acquisitions, he would be entitled on the death of the father to regard them as property of which he could demand a share in the same way as if it were ordinary co-parcenary property which, for same reason or other, had been omitted from the original partition. The answer is that, while theoretically the sons have an interest by birth in their father's self-acquisitions, still, as the father can dispose of those acquisitions at his pleasure, they are not coparcenary property in the ordinary sense, and it is only the latter property that can form the subject of partition. After obtaining on partition his share of all the divisible property, the separating son loses all the rights which he had as a member of the co-parcenary and it was only as a member of the co-parcenary that he had by birth an interest in his father's self-acquisitions. All the right that remains to him with regard to his father's property is the right by virtue of his sonship to inherit in the absence of undivided sons.

We find therefore that the plaintiff, as the undivided son of his father, is solely entitled to execute the decree in Original Suit No 20 of 1901 on the file of the Subordinate Judge of Tanjore, and that he is also solely entitled to the house, plaint item No. 2. The decrees of the lower Courts will be modified accordingly. The first defendant will pay the plaintiff's costs in this Court. The point on which the plaintiff has succeeded was not taken in the Courts below. The parties will bear their own costs in the Courts below.

APPELLATE CRIMINAL.

Before Mr. Justice Wallis.

MYLAPORE KRISHNASAMI *alias* KRISHNASAMI SARMA,

v.

EMPEROR.*

1909. February 16, 17, 19. March 24, 31. April 1, 7.

Penal Code, Act XLV of 1860, *s.* 124A—*Criminal Procedure Code, ss.* 225 *and* 537—*Actual words used, need not be stated in charge or proved in prosecution under s.* 124A *of the Indian Penal Code—Evidence Act, ss.* 159 *and* 160—*Relevancy of notes of speeches.*

***Held, per* BENSON *and* WALLIS, JJ.—The gist of an offence under section 124A of the Indian Penal Code, is the bringing or attempting to bring into hatred or contempt or the exciting or attempting to excite disaffection towards his Majesty, etc.**

If an offence under section 124A is committed by words spoken, the requirements of the law are satisfied if the charge gives such a description of the words used as is reasonably sufficient to enable the accused to know the matter with which he is charged, *i.e.*, if the charge states the words used with substantial, though not absolute, accuracy; and it is enough if the substance of the words proved to have been used, is the same as that of the words set out in the charge. Even if the words or the substance of the words used, are not entered at all in the charge, this will be only an irregularity which, under section 225 of the Code of Criminal Procedure, will not vitiate a conviction unless such omission has misled the accused and occasioned a failure of justice.

Chithambaram Pillai v. *Emperor* [(1909), I.L.R., 32 Mad., 37] referred to.

Per SANKARAN-NAIR, J.—Where a person is charged under section 124A with exciting disaffection or bringing his Majesty into hatred or contempt, the exciting of disaffection and not the utterance of seditious words, is the gist of the offence and the charge need not set out the words, nor need the words themselves be proved.

It is, however, quite different where the person is charged with *attempting* to excite disaffection. Attempt implies intention, and a man's intention must be gathered from the words used by him and not from what others rightly or wrongly understood him to mean.

In such cases the words themselves are the gist of the offence and they ought to be set out in the charge; and whether set out or not must be proved.

Where the words, though not actually in the charge, are indicated with sufficient certainty and the accused knows the words for which he is tried, the defect in the charge can be cured under section 225 or 537 of the Code of Criminal Procedure. What ought to be contained in a charge is a different question from what ought to be proved to secure a conviction; and although the omission to state the exact words may not vitiate the charge, the words themselves must be proved to convict a person for attempting to excite disaffection.

Where a person records, not the actual words used, but simply notes of the impression made on his mind by a speech, such notes are inadmissible under section 160 of the Evidence Act to prove the actual words used.

* Criminal Appeal No. 844 of 1908.

WALLIS, J.

MYLAPORE KRISHNASAMI *v.* EMPEROR.

CRIMINAL appeal against the sentence of R. D. Broadfoot, Sessions Judge of Coimbatore Division, in case No. 85 of the Calendar for 1908.

The facts for the purpose of this report are sufficiently set out by (BENSON and SANKARAN-NAIR, JJ.) which was as follows :—

T. Rangachariar and *P. Rajagopalachariar*, for appellant.

The Public Prosecuter in support of the conviction.

JUDGMENTS (BENSON, J.).—The appellant A. Krishnasami Sarma who describes himself as "a failed Matriculate" and "Swadeshi preacher" has been convicted of an offence punishable under sections 124A, 153*a* and 505 of the Indian Penal Code, in that on the 17th March last he made a seditious speech in Tamil at a public meeting at Karúr in the course of which, he, among other matters, uttered words to the following effect :—

"We don't want titles given by the Government. They thus dupe us. The excessive joy of the Government is only for the time being. They supply us half belly, while they themselves fill in theirs one and a half times. There is no spirit here at all. See, in such a worthless place as Tuticorin, swadeshi effort is so great, that they have demolished and destroyed the Paradeshi Courts, *viz*, Collector, Munsif, Police, etc. Why should we not do like that. Our people are paid low, and a regiment is formed of them. Why should they not exert on behalf of the swadeshi cause, and, to help our Mother, use their guns to shoot the white faces? If we do that, could we not get self-Government (Swaraj)? They eat our money, and they are ungrateful. Do we not see the injustice they do. We have to put up with whatever the white people do. We must work hard for our Mother. We pay our money in the shape of pension, to the Feringhees, and we are left without anything. In England, a policeman is paid £25, while we here are paid only Rs. 7. Is this not deception? Does this show good intention? If we all unite together, could we not blow away the white people like cotton?"

The chief offence alleged against the appellant is that punishable under section 124A, Indian Penal Code. It was suggested

APPELLATE CRIMINAL.

Before Mr. Justice Wallis.

1909. February 16, 17, 19. March 24, 31. April 1, 7.

MYLAPORE KRISHNASAMI *alias* KRISHNASAMI SARMA,

v.

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Penal Code, Act XLV of 1860, *s.* 124A—*Criminal Procedure Code, ss.* 225 *and* 537—*Actual words used, need not be stated in charge or proved in prosecution under s.* 124A *of the Indian Penal Code—Evidence Act, ss.* 159 *and* 160—*Relevancy of notes of speeches.*

Held, per BENSON and WALLIS, JJ.—The gist of an offence under section 124A of the Indian Penal Code, is the bringing or attempting to bring into hatred or contempt or the exciting or attempting to excite disaffection towards his Majesty, etc.

If an offence under section 124A is committed by words spoken, the requirements of the law are satisfied if the charge gives such a description of the words used as is reasonably sufficient to enable the accused to know the matter with which he is charged, *i.e.*, if the charge states the words used with substantial, though not absolute, accuracy; and it is enough if the substance of the words proved to have been used, is the same as that of the words set out in the charge. Even if the words or the substance of the words used, are not entered at all in the charge, this will be only an irregularity which, under section 225 of the Code of Criminal Procedure, will not vitiate a conviction unless such omission has misled the accused and occasioned a failure of justice.

Chithambaram Pillai v. *Emperor* [(1909), I.L.R., 32 Mad., 37] referred to.

Per SANKARAN-NAIR, J.—Where a person is charged under section 124A with exciting disaffection or bringing his Majesty into hatred or contempt, the exciting of disaffection and not the utterance of seditious words, is the gist of the offence and the charge need not set out the words, nor need the words themselves be proved.

It is, however, quite different where the person is charged with *attempting* to excite disaffection. Attempt implies intention, and a man's intention must be gathered from the words used by him and not from what others rightly or wrongly understood him to mean.

In such cases the words themselves are the gist of the offence and they ought to be set out in the charge; and whether set out or not must be proved.

Where the words, though not actually in the charge, are indicated with sufficient certainty and the accused knows the words for which he is tried, the defect in the charge can be cured under section 225 or 537 of the Code of Criminal Procedure. What ought to be contained in a charge is a different question from what ought to be proved to secure a conviction; and although the omission

* Criminal Appeal No. 844 of 1908.

to state the exact words may not vitiate the charge, the words themselves must be proved to convict a person for attempting to excite disaffection.

Where a person records, not the actual words used, but simply notes of the impression made on his mind by a speech, such notes are inadmissible under section 160 of the Evidence Act to prove the actual words used.

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"We don't want titles given by the Government. They thus dupe us. The excessive joy of the Government is only for the time being. They supply us half belly, while they themselves fill in theirs one and a half times. There is no spirit here at all. See, in such a worthless place as Tuticorin, swadeshi effort is so great, that they have demolished and destroyed the Paradeshi Courts, *viz*, Collector, Munsif, Police, etc. Why should we not do like that. Our people are paid low, and a regiment is formed of them. Why should they not exert on behalf of the swadeshi cause, and, to help our Mother, use their guns to shoot the white faces? If we do that, could we not get self-Government (Swaraj)? They eat our money, and they are ungrateful. Do we not see the injustice they do. We have to put up with whatever the white people do. We must work hard for our Mother. We pay our money in the shape of pension, to the Feringhees, and we are left without anything. In England, a policeman is paid £25, while we here are paid only Rs. 7. Is this not deception? Does this show good intention? If we all unite together, could we not blow away the white people like cotton?"

The chief offence alleged against the appellant is that punishable under section 124A, Indian Penal Code. It was suggested

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rather than argued, for the appellant that the conviction was unsustainable in law, and should be set aside, because the charge did not set out, nor did the prosecution prove, the exact words used by the appellant. It was suggested that the definition of the offence punishable under section 124A shows that seditious words spoken or written are the gist of the offence, and that unless the exact words are proved the offence cannot be established.

I do not think that this contention is valid. I am of opinion that the contention is not supported by the language of the Code, and that it is opposed to the reported decisions of this Court in similar cases.

Section 124A reads as follows :—

"Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards Her Majesty or the Government established by law in British India, shall be punished with transportation for life or any shorter term, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine."

In this section, as I read it, the gist of the offence is the bringing or attempting to bring into hatred or contempt or the exciting or attempting to excite disaffection towards Her Majesty or Government established by law in British India. The opening words of the section "whoever, by words either spoken or written, or by signs, or by visible representation, or otherwise" merely indicate the various means by which the offence may be committed. The concluding words "or otherwise" indicate the universality of the means by which the offence may be committed. The whole sentence might have been shortly expressed by saying "whoever *by any means*" brings, etc. The offence may be committed by means of words spoken or written, or by visible representations such as pictures, or by dramatic performances, even in dumb show, where no words are spoken, but where the feelings of the audience are excited, by the gestures and motions and dramatic actions of the performers. Thus words of any kind are by no means a necessary element of the offence. It may be committed without any words being spoken or uttered. Let us suppose that the offence has been committed by means of a series of pictures (which have subsequently been destroyed), or by means of a dramatic

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performance, in dumb show, representing (let us say) His Majesty as engaged in cruelly killing innocent persons or as indulging in some revolting vice. In such a case it would be impossible to reproduce the pictures or the dramatic representation and embody them in the charge. It would only be possible to indicate in the charge the means by which the offence was committed by giving a description (as accurate as circumstances would permit) of the pictures or representation. No words could give a completely accurate description of the pictures or representation; but there would usually be no great difficulty in giving such a description of them as would enable the accused to know the matter he was charged with, and this is, in fact, all that the law requires. The Code of Criminal Procedure lays down simply and clearly what the charge against an accused person must contain. "If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused *notice of the matter with which he is charged*" (section 221). "The charge shall contain such particulars as to the time and place of alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed as are *reasonably sufficient to give the accused notice of the matter with which he is charged*" (section 222); and "when the nature of the case is such that the particulars mentioned in sections 221 and 222 do not give the accused sufficient notice of the *matter with which he is charged*, the charge shall also contain *such particulars of the manner* in which the alleged offence was committed *as will be sufficient for that purpose*" (section 223).

If an offence under section 124A is committed by means of a series of pictures, the requirements of the Code are satisfied if the charge gives such a description of the pictures as is reasonably sufficient to enable the accused to know the matter with which he is charged; and so, I take it, if an offence under the section is committed by words spoken, the requirements of the law are satisfied if the charge gives such a description of the words used as is reasonably sufficient to enable the accused to know the matter with which he is charged, that is, if the charge states the words used with *substantial*, though not absolute, accuracy. Even if the words, or the substance of the words used, are not entered at all in the charge, this will amount only to an irregularity and will not afford ground for reversing a conviction unless the accused has,

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in fact, been misled by the omission, and it has occasioned a failure of justice (section 225, Criminal Procedure Code, illustration (*b*)).

The above statement of the law is in accordance with the recent decision of this Court in *Chidambaram Pillai* v. *Emperor* (1). There the accused was charged with an offence under section 124A, Indian Penal Code, in that he "on or about the 23rd day of February 1908 at Tuticorin, in a public speech, did bring or attempt to bring into hatred and contempt, etc." The charge did not contain the words, or the substance of the words uttered but in the preliminary enquiry before the Magistrate the notes of the accused's speech taken by the police officers had been filed and evidence had been given that the notes though not a *verbatim* report, yet fairly represented the substance of the words spoken. The Court (White, C.J., and Miller, J.) held that the charge "was defective in that it did not set out the speeches, or the passages in the speeches, which the prosecution alleged to be seditious", but added "It is not necessary for us to consider whether, under the law of England, this charge as an indictment would be good. The Indian Legislature in addition to the general provision contained in section 537, Criminal Procedure Code, has expressly provided that formal defects shall not in themselves vitiate a charge. Section 225, Criminal Procedure Code, enacts 'no error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars shall be regarded at any stage of the case as material, unless in fact, misled by such error or omission, and it has occasioned a failure of justice.' The principle of illustration (*b*) to this section seems to us to be applicable to the present case." The learned Judges then pointed out that the accused was fully aware, from the proceedings before the Magistrate, of the passages in the speeches upon which the prosecution relied as being of a seditious character, and had full opportunity of meeting the case put forward by the prosecution and did, in fact, call a number of witnesses for that purpose, without taking objection to the omission in the charge. In these circumstances the learned Judges held "notwithstanding the omission of the particulars which, in our opinion, the charge

(1) (1909) I.L.R., 32 Mad., 3.

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ought to have contained, we are certainly not prepared to say that the accused was, in fact, misled by the omission and that the omission has occasioned a failure of justice." They, therefore, held that the trial was not invalid by reason of any defect in the charge, and proceeded to deal with the question whether the prosecution had proved that the accused had uttered the words alleged to be seditious. After referring to the fact that the police officers who were called as witnesses made use of their notes in order to refresh their memories and gave evidence in accordance with their notes, the learned Judges observed "the police officers do not profess to have taken a *verbatim* note of the words used by the accused. The record which they made of the speeches was of the same character as the record made by the witnesses in the trial of Edmonds and others, 1821, Reports of State Trials, New Series, Vol. 1, pp. 818 and 819, where the witnesses were allowed to read their notes as evidence of the speeches made. The second witness for the prosecution stated in evidence that his notes represented to the best of his ability the substance of what the speakers said. The third witness stated that he took down to the best of his ability the words actually uttered. The fifth witness stated that his notes represented what the first accused said, and that everything found written there was in substance said by the first accused. The sixth witness for the prosecution speaking of his notes said: "All these words were uttered by the speaker and it is a substantially correct record of the speech" He also said: "My notes are not a *verbatim* report. I noted as far as I could the important utterances. I omitted things I considered 'unimportant.' He also said:—'In my notes I used, as far as possible, the exact words of the speakers . . . . The notes contain the very words uttered by Chidambaram Pillai as far as I was able to take them.' The seventh witness said 'the notes accurately set forth what the speaker said'." Finally after pointing out that the evidence of the police witnesses was to some extent corroborated by other witnesses the learned Judges stated "The conclusion at which we have arrived is that the notes taken by the police officers are *substantially accurate* and that the evidence given by the police witnesses may safely be acted upon".

The circumstances of the present case and the character of the evidence for the prosecution are very similar to those in

Chidambaram Pillai v. *Emperor* (1) with this difference that in the present case the charge sets out in substance the passages in the speech of the accused by means of which he excited, or attempted to excite disaffection, etc. The speech was delivered in Tamil and the notes of the speech made by the police officers were taken in Tamil. The charge does not, indeed, set out the whole of the speech as recorded in the notes of the police witnesses, but it sets out an English translation of those passages which are relied on by the prosecution as being the means whereby the offence was committed, and alleges that the accused, among other matters, uttered words to the effect stated, and thereby did bring or attempt to bring into hatred and contempt, etc. There is no suggestion that the translation is not a correct translation. The defence is that the appellant did not use the words alleged or any words substantially to the same effect, and that so far as the language imputed to him is seditious, the case is a concoction by the police.

The only question, in fact, is whether the appellant made an innocent speech advocating the development of native industries and the like, or whether he made a seditious speech including the words charged or words substantially to the same effect.

The Sessions Judge and the Assessors were unanimous in finding the appellant guilty, and I have no doubt that their finding is correct.

[His Lordship then discussed the evidence at length.]

I would therefore confirm the conviction and dismiss the appeal, but as my learned brother takes a different view, the case must be laid before another Judge for decision.

SANKARAN-NAIR, J.—The appellant Mylapore Krishnasami Sarma is convicted and sentenced to five years' transportation for having uttered seditious words in the course of a speech he delivered at a temple at Karúr in the Coimbatore district on the 17th March 1908.

[After stating the facts of the case, His Lordship continued as follows :—]

Though the question to be decided is one of fact, there are several considerations which, there is reason to believe, are not kept in view by the trial Courts in similar cases. I proceed accordingly to refer to a few of them.

(1) (1909) I.L.R., 32 Mad., 3.

Section 124A is in these terms :—.

"Whoever by words, either spoken or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite disaffection towards Her Majesty or the Government established by law in British India, shall be punished . . . ."

Under this section an accused person may be charged with exciting disaffection or bringing Her Majesty into hatred or contempt by words or other means. In this case it may be said that exciting disaffection is the gist of the offence, not the uttering of seditious words. For instance, if the prosecution proves that the appellant addressed a crowd, who immediately after assaulted the Europeans in the locality or destroyed the public buildings to show their hatred of Government, it may not be necessary to prove the words used by the appellant, not even the substance, though any Court of Justice will be slow to convict in the absence of any such proof which alone ordinarily will show that the one was the result of the other. The culpability consists in the disastrous consequences brought about by his words. Even though the words themselves may be innocent or uttered in a sense different from that in which they were understood by the crowd, the speaker may be guilty. The charge therefore need not set out the words nor need the words themselves be proved. But though the appellant was charged with exciting disaffection, he has not been convicted for it nor is there any evidence in support of it; the evidence of the witnesses who do not speak to the words being used are only intended to show that the appellant entertained hostile feelings. In paragraph 2 of the judgment, the Judge sets out the prosecution case tried by him. He says, "analysing the charge, we find that it consists of (*a*) words "calculated to cause disaffection towards the Government, (*b*) an "incitement to commit rioting and destroy Government Courts, "and (*c*) an incitement to the sepoys to mutiny and shoot the "Europeans, whereby the goal of Swaraj might be reached." He has thus been tried and convicted for attempting to excite disaffection, not for having excited it. But whatever may be the case when a person is charged with exciting disaffection, when he is charged with *attempting* to create disaffection the facts to be proved by the prosecution are entirely different. The section shows that a person must (*a*) *speak* or *write* certain words and

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(*b*) *by* such words *attempt* . . . . Attempt implies intention. It is not enough therefore that a person writes certain words. He may write a seditious pamphlet and keep it locked up in his drawer. He has not thereby committed any offence. Similarly it is not enough that he entertains an intention to excite disaffection, to bring him within the scope of the section. Thus Mr. Mayne states in his commentary upon section 124A. "The offence constituted by it requires an act coupled with a distinct intention." (Mayne's 'Criminal Law of India,' III edition, page 525.) This is also settled by decisions in India. Petheram, C.J., points out that the accused should speak or write *words* calculated to create disaffection, etc., and he must do so with the *intention* of creating it. See *Queen-Empress* v. *Jogendra Chundra Bose*(1). See also *Queen-Empress* v. *Bal Gangadhar Tilak*(2). A man's intention must be gathered from the words used by him, not by what others rightly or wrongly understood him to mean.

Whenever a person uses words of which the inevitable or natural consequence is hatred or disaffection, he must be taken to have foreseen that consequence and deliberately intended that it should be the result of his use of the words that produced such result. The intention must be judged primarily by the language itself or, in other words, the question is what is the meaning of the language used? *Foster* v. *Clement*(3). Again whether the words are seditious or not, is a matter of law to be determined by the Judge and should not be left to the judgment of the witnesses. For the Court to judge whether the words are seditious, it is essential that the words themselves used by the appellant, for which he is tried, must be proved. Otherwise it is not possible for a man to know what he is to defend. It is not possible for him to show that he has not spoken those words, or to show that the words taken with the rest of his speech bear a very different meaning from what is stated by the witnesses. Because, where the whole speech or document is available, it has been repeatedly pointed out that the meaning has to be collected from the whole document and not from isolated passages. Further when only certain words

(1) (1892) I.L.R., 19 Calc., 35 at p. 44. (2) (1898) I.L.R., 22 Bom., 138.
(3) 10 B & C., 472.

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are taken down which appeared to be inflammatory and there was a good deal more said than has been taken down the question, as pointed out by Alderson, J., in his charge to the Jury in *R.* v. *Rankin and others*(1) is "Whether you can suggest yourselves, if these parts be true, anything which might have been said, which fairly and reasonably could have explained those things." This, of course, is more favourable to the accused than if the whole speech had been reported *verbatim*. For this purpose also it is necessary that the words themselves must be proved. External evidence may be offered to prove the intention or the meaning of the language. This also would be a useless provision otherwise. In this case other speeches have been proved. As pointed out by Mr. Mayne, section 295, they can be used only for throwing light on the meaning of the words on which the charge is based and of showing the effect they were intended to produce. As justly pointed out by him the fact that the accused entertained disloyal sentiments cannot make language which, in itself, does not fall within the scope of sections 124A and 153A criminal, and he cannot be convicted for those sentiments if they do not find expression in the language on which he is charged. This also leads to the same conclusion. As the words written or spoken are the gist of the offence, they ought to be set out in the charge and those words themselves, whether set out or not, must be proved. If the words be not in the English language it must be set out in that spoken language *verbatim*, with the English translation. The Chief Justice and Mr. Justice Miller, apparently took the same view *in re Subramania Siva*(2). In speaking of the charge in that case they say, "we think it was defective in that it did not set out the speeches or the passages in the speeches which the prosecution alleged to be seditious." And they found in that case "that the speeches containing the passages, which, the prosecution alleges, are of a seditious character, were, in fact, made by the first accused" at page 27. The words are set out in the charge to be proved. It may not be necessary to prove all the words or passages set out to obtain a conviction. It will be sufficient if the words proved amount to the offence. But those words must be there in the charge. If the words themselves are not actually in the charge, but they are indicated therein with

(1) 7 St.Tr.N.S., 790. (2) (1909) I.L.R., 32 Mad., 12.

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sufficient certainty and the accused knows the words for which he is tried, then the case will be only one of defective charge to which section 537, Criminal Procedure Code, will apply. But where the charge does not refer to the words at all, or where the accused, before the trial begins, is not informed of the words used by him for which he is tried, the case is not one to which that section would apply. The English Common Law seems to be clear. See 'Archbold' (XXIII edition) in the chapter on Indictment, page 75, "Where words, written or spoken, are the gist of the offence, they must be set forth *verbatim* or with particularity in the indictment; as, for instance, in an indictment . . . . for blasphemous or seditious words; *R.* v. *Popplewell*(1), *R.* v. *Sparling*(2)." And in the chapter on evidence at page 302 "where words are the gist of the offence and consequently set out in the indictment (see *ante* page 75) they must be proved as laid . . . . But, if some of the words be proved as laid, and the words so proved be sufficient to constitute the offence for which the defendant is indicted, failing to prove the remainder of the words will not be material." See also *R.* v. *Fussel*(3). For forms of indictments for seditious libel and seditious words at Common Law, see 'Archbold,' pp. 988, 997. The case of *Zenobio* v. *Axtell*(4), *R.* v. *Peltier*(5) show that, according to English Law, if the words be in a foreign language they must be set out in that language *verbatim* together with a correct translation. See *Braudlaugh's* case(6), where the law is fully discussed. Where the offence charged is treason or seditious conspiracy in England, or under sections 121 and 121A of the Indian Penal Code, and not seditious libel or words, then words are only laid as an overt act; they are not the gist of the offence but merely evidence of it and therefore it is sufficient to set forth their substance. I am therefore of opinion that in a charge for uttering seditious words, such words must be indicated, at least with reasonable certainty in the charge; the accused must be informed of such words; and such words or some of them that would show the guilt, must be proved. This question has nothing to do with the charge itself. What are the facts to be proved to secure a

(1) 2 Str., 686.
(2) 1 Str., 497.
(3) 6 St. Tr.N.S., 723; ...vo. Jac., 407.
(4) 6 T.R., 162.
(5) 28 St. Tr., 529.
(6) (1877-8) 3 Q.B.D., 607.

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conviction is a very different question from whether the accused has sufficient notice of those facts necessary to be proved against him. In the latter case, an omission to state the particulars which ought to be stated in the charge will not be treated as material, unless it has occasioned a failure of justice. The English rule as to what ought to be set forth in the indictment is modified in India by sections 225 and 537, Criminal Procedure Code. But the provisions as to what ought to be contained in a charge have nothing to do with the question, what are the facts to be proved to constitute the offence, and, in my opinion, to convict a person for attempting to excite disaffection, the words themselves must be proved.

[His Lordship then discussed the evidence at great length.]

Under section 159, Indian Evidence Act, the police constable may refresh his memory by referring to his notes, or in other words, if he actually recollects what the appellant said at that meeting on reading his notes however brief, he may swear to them. The notes themselves do not become admissible on that account alone. According to this section it is not necessary that the witness must be sure that what was reduced to writing by him is a correct record. It is enough, if on reading it, the true facts are recalled to his memory. But if he does not actually recollect himself what the appellant said, if the words are not recalled to his memory, then the notes may be admitted under section 160, Indian Evidence Act, if he is sure that the facts were correctly recorded in the notes. Here the facts about which he had to give evidence are the words used by the appellant. If therefore the constable has not recorded correctly the words used by the speaker but only his impression, then the notes would be inadmissible under section 160 of the Indian Evidence Act to prove the words used. They may be admissible to prove the impression created in the mind of the constable, which is very different. In O'Connel's case, parts of the speech were taken *verbatim*. They may be used both under sections 159 and 160. The substance of the rest of the speech was given from memory which the witness would be entitled to do under section 159, if the substance of the speech is relevant and admissible. But all the English cases cited by the Public Prosecutor are distinguishable on the ground that they relate to treason or seditious conspiracy where the words have not to be proved.

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[His Lordship then continued to discuss the evidence.]

I am therefore of opinion that the prosecution evidence has failed to prove that the appellant uttered the important incriminating words referred to in the charge. The charge itself does not state that these words were used. It is quite clear that no part of the speech was taken down *verbatim*. The evidence of the constables as to the words uttered so far as they are able to speak from their recollection do not support the prosecution case. The fifth, sixth and seventh witnesses profess to give the exact words used. But in the case of the sixth and seventh witnesses, it is clear they are only speaking to the inferences drawn by them; and the actual words themselves so far as they remember them, even if their memory is to be trusted, need not convey the guilty intention required by the section. The fifth witness, if believed, undoubtedly shows the appellant is guilty. He gives the words. But it is in substance not the prosecution case and though the sixth and seventh witnesses refer to the same sentences, they say they did not hear the important words which show the guilt. The cross-examination shows that his memory is blank on many important points, and that on the whole his memory is unreliable. The prosecution evidence as a whole if believed shows that the speech made by the appellant left in the minds of these witnesses the impression that the people of Karúr should demolish the public buildings, they must fight the Europeans and conquer them.

For the witnesses receiving this impression the appellant cannot be convicted; as I have already stated the words are the ground of complaint and the words for the uttering of which he is tried must be proved. As the Crown has clearly failed to prove the words and in fact did not even undertake to prove them, the appellant is in my opinion entitled to an acquittal. On this view it becomes unnecessary to consider the defence evidence. I shall however shortly state my opinion.

[His Lordship then discussed the evidence for the defence.]

I am therefore clearly of opinion that the conviction should be set aside and the accused acquitted.

JUDGMENT (WALLIS, J.).—In this case the accused was charged with committing offences under sections 124A and 153A of the Indian Penal Code on the 16th March 1908, and with committing similar offences and also offences under section 505, clauses (*a*) and (*c*), of the Indian Penal Code on the 17th March 1908. The charges

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in respect of the 16th March were not proceeded with at the trial, and the accused was tried and convicted of having committed offences under sections 124A and 153A, Indian Penal Code, on the 17th March 1908 and also of an offence under section 505, Indian Penal Code. In the argument before me no objection was raised to the form of the charge, but as the questions as to the proper form of charge are discussed by the learned Judges who heard the appeal, and as these questions are of general importance I think it necessary to deal with them. With regard to setting out the words in charges of this kind it was held in England by all the Judges advising the House of Lords in Sacheverell's case, Vol. 15, St. Tr., p. 466, that in all prosecutions by indictment or information for crimes and, misdemeanours by writing or speaking, the particular words which are supposed to be criminal ought to be expressly mentioned in the indictment or information. This I take it was only an application of the general rule which required the offence to be stated with certainty. The question whether it was necessary to prove that the precise words charged in the indictment were actually used was raised by Mr. (afterwards Sir Samuel) Romilly on the trial of John Binns in 1797, and after Mr. Spencer Perceval had argued for the Crown, that the mode of proof for which Mr. Romilly was contending would make it absolutely impossible ever to obtain conviction, it was ruled by Mr. Justice Ashhurst that it was sufficient if the words proved were the same in meaning though not the precise words charged (*R.* v. *Binns*(1)). A rather stricter rule appears to have been applied by Wilde, C.J., Parke, B., and Maule, J., in *R.* v. *Fussell*(2) who whilst ruling that all the words set out in the indictment need not be proved but only so many of them as are in themselves sufficient to constitute the crime, were of opinion that the words proved must be proved as laid in the indictment, as otherwise there would be a variance between the indictment and the evidence. Under the rigid rules of the Common Law variances between the indictment and the evidence as to material averments were fatal whether they affected the merits or not, and Lord Cardigan was acquitted on an indictment for shooting at his opponent in a duel because the prosecution failed to prove the opponent's full name as set out in the indictment.

(1) 26, St. Tr., 614.

(2) 6, St. Tr., N., S. 723 at p. 746.

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As pointed out by Mr. Justice Stephen in his history of the Criminal Law, the Legislature has never attempted a thorough reform of the English rules of criminal pleading and has been content in 14 and 15 Victoria 100 to guard against some of the more obvious miscarriages resulting from their strict enforcement.

I have stated what I understand to be the state of the English authorities as to indictments for seditious words, but I agree with Mr. Justice Benson that we have no concern with them, because as respects charges we are governed in this country by the provisions of the Code of Criminal Procedure which are not, and do not purport to be, an exact reproduction of the English rules as to indictments, and indeed were expressly framed in such a manner as to give no room for merely technical objections not going to the merits of the case.

Under section 221 (3) of the Code of Criminal Procedure, as the law does not give offences under sections 124A and 153A any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged. Then, under section 222, the charge must contain particulars as to the time and place of the alleged offence, and, under section 223, when the offence is such that the particulars mentioned in sections 221 and 222 do not give the accused sufficient notice of the matter with which he is charged, the charge shall contain such particulars of the manner in which the offence was committed as will be sufficient for that purpose. Illustration (*c*) which is nearest to the present case is as follows:—"*A* is accused of giving false evidence at a given time and place. The charge must set out that portion of the evidence given by *A* which is alleged to be false." Similarly, a charge under section 124A or 153A which did not contain particulars of the words alleged to have been used would in my opinion offend against this section as has been held by this Court recently in *re-Chidambaram Pillay's case*. It would, I think, be best to set out the words which it is intended to prove, as nearly as possible, but, so long as the substance of the words is set out, I find nothing in our law that requires that the words set out should be proved *verbatim et literatim*; and if the charge is in English and the words uttered were in Tamil, I find nothing in our law requiring that the actual words should be set out in Tamil.

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Then, too, section 225 appears to me to be expressly aimed amongst other things at objections on the ground of variance between the charge and the evidence, [see illustration (*b*)] as it provides that no error in stating the offence or the particulars required to be stated in the charge, and no omission to state the offence or such particulars shall be regarded at any stage as material unless the accused was in fact misled by such error or omission and it has occasioned a failure of justice. I am therefore of opinion that it is enough if the substance of the words used is set out in the charge, and that it is enough if the substance of the words proved to have been used is the same as that of the words set out in the charge.

[His Lordship then proceeded to discuss the evidence.]

As to the sentence, the words which the accused has been convicted of using, were highly seditious and mischievous and though the exciting news from Tinnevelly may have led the accused to go further than he would otherwise have gone, I cannot regard his speech on the 17th as an isolated act. The evidence as to his other speeches at Karur appears to show that there was a good deal of sedition mixed up with his Swadeshi preaching. I think, however, that in determining his sentence, his youth and inexperience, and the probability that he was an instrument in the hands of others may properly be taken into account, and that in the circumstances of the present case these considerations warrant his being dealt with more leniently than an older and more experienced offender. The justice of the case will, I think, be met by a sentence of three years' rigorous imprisonment; and I dismiss the appeal and reduce the sentence accordingly.

PRIVY COUNCIL.

P.C.*
1908.
May 14, 17.
July 20.

SHUNMUGAROYA MUDALIAR (DEFENDANT),

v.

MANIKKA MUDALIAR (PLAINTIFF).

[On Appeal from the High Court of Judicature at Madras.]

Will—Execution of will—Evidence on the question of whether the testator was of sound disposing mind at time of execution—Reversal by Appellate Court of decision of Judge who heard evidence and entirely disbelieved their testimony—Onus of proof.

On a contested application for probate in which the question was whether a testator was of sound disposing mind on two separate occasions when he was alleged to have executed a will and a codicil, the Judge who saw and heard the witnesses decided that the only reliable evidence was that of the doctor who attended the testator and attested the two documents, and that if the doctor's evidence was true, then that of the principal witnesses in support of the will could not be; and he therefore disbelieved their story as to the execution of the documents, and dismissed the application for probate. The Appellate Court being of opinion that he had not given adequate consideration to the possibility that, in spite of the testator's physical infirmity his mental capacity was sufficient, reversed the decision and granted probate of the will and codicil: *Held*, by the Judicial Committee (reversing the judgment of the Appellate Court) that the medical evidence entirely justified the view of the Judge who heard the evidence, namely, that it left the onus on the plaintiff who propounded the will quite undischarged, so that in the absence of other reliable evidence he had no alternative but to dismiss the application.

It is always difficult for Judges who have not seen or heard the witnesses to refuse to adopt the conclusions of fact of those who have, but that difficulty is greatly aggravated when the Judge who heard them has formed the opinion not only that their inferences are unsound on the balance of probability against their story, but that they are not witnesses of the truth.

Coghlan v. *Cumberland*, [(1898) L.R., 1 Ch., 705], referred to.

APPEAL from an appellate decree (17th January 1906) of the High Court at Madras, which reversed a decree (8th February 1905) of the same Court in its original jurisdiction.

The only question raised on this appeal was as to the validity of a will executed on 11th October 1903 by Thiruvengada Mudaliar, and of a codicil thereto executed on 18th October 1903.

* *Present*:—Lord MACNAGHTEN, Lord ATKINSON, Lord COLLINS and Sir ANDREW SCOBLE.

Prior to September 1901 the testator was a member of an undivided Hindu family possessing considerable immoveable property. In that month the members of the family, consisting of the testator, his brother Shunmugaroya, the present appellant, and their cousins agreed to partition the property, the cousins taking a one-half share of the property, and the testator and his brother one-quarter share each. The value of the share which came to the testator was about Rs. 50,000. He was about seventy years of age and had no wife or children or grand-children. The appellant was the person who would be his heir if he died intestate.

The testator had a house in the village of Irumbiliceri and also a house at Madras. In September 1903 he went to Madras. On 3rd October 1903 he had a stroke of paralysis from which he never recovered and eventually died on 10th February 1904. At the time he was taken ill he was living in a house which had fallen to the share of Ramakrishna, the eldest of his cousins, and he remained there until his death. The respondent Manikka, who was the husband of Ramakrishna's sister, was at the same house. The will was executed on 11th October 1903: the testator by it bequeathed all his property to the respondent, gave an annuity of Rs. 10 per mensem to the respondent's wife's sister; and directed that the marriage expenses of her daughter Rajammal should be paid. The will recited that the testator was not expected to survive. It was written by Srinivasa Aiyangar: the attesting witnesses were K. C. Ramiah and M. Vijaya Raghavulu. On 13th October 1903 the respondent wrote an application to the Registrar to come and register the will, and on 14th October it was registered at Ramakrishna's house by Alwar Aiyangar, who was temporarily acting as Sub-Registrar. On 17th October the respondent again applied to the Registrar to come and register the codicil; but it was not ready and was not executed until 18th October. The codicil explained why the respondent was made legatee, fixed Rs. 2,000 as the marriage portion of Rajammal, and gave her mother Rs. 500 in addition to the annuity. Six witnesses attested the codicil, namely, N. Ramakrishna, M. Iyathumby Mudaliar, Srinivasa Chari, P. Loganatha, Veeraragava Mudaliar, and M. Vijaya Raghavulu. On the 20th October 1903 the Sub-Registrar Ananta Chari refused to register the codicil as the testator was unconscious, but it was registered on 26th October 1903 by Alwar Aiyangar who was again acting temporarily. A

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power-of-attorney was later drawn up by Ramakrishna, executed on 26th November 1903 by the testator in favour of the respondent, and registered by Alwar Aiyangar on the next day.

The respondent, on 25th April 1904, applied to the High Court at Madras for probate of the will and codicil. The application was opposed by the appellant, and the suit was tried by Mr. Justice BODDAM; who, after referring to the case of *Hardwood* v. *Baker*(1) as to what were the tests of "a sound disposing mind," came to the conclusion that he was unable to believe the evidence of the plaintiff, of Ramakrishna, and of Srinivasa Chari, the principal witnesses for the will, and that he could only rely on the evidence of the native doctor Vijaya Raghavulu on which he found that the testator was not at the time of the execution of the will and codicil of sound disposing mind. The material portion of his judgment was as follows:—

"Upon the question of the exact state of mind of the deceased and of what occurred when the will was executed, practically, I do not find that I have any evidence beyond that of the doctor that I can rely upon. I do not hesitate to say that, from their evidence and the way in which it was given, I do not believe Ramakrishna Mudali or Manika Mudali. I believe that they have come here deliberately with the intention of trying to make out a story which is not true. I cannot rely upon the evidence of Srinivasa Chari, for I do not believe him. In these circumstances I have to be satisfied that the state of mind of the deceased man at the time the will was executed was such that he was capable of making the will propounded. For this I am dependent upon the evidence of the persons called before me in this case as the persons who were present at the time and of those called I am unable to believe the evidence of any of them excepting the doctor. With the exception of his evidence there has been no evidence given except that of Jaganatha Mudali, Dr. Browning and Alwar Ayangar. As regards the former I don't for a moment believe him. His evidence is worthless.

"The *onus probandi* lies in every case upon the party propounding the will, and he must satisfy the conscience of the Court that the instrument so propounded is the last will of a free and capable testator. This must be done by proof of capacity and the fact of execution from which the knowledge of and assent to the contents of the instrument are, in ordinary cases, assumed.

(1) (1839) 3 Moore's P.C., 282 at p. (290).

"The facts are these:—On 3rd October 1903, eight days before the first will was executed, the deceased had a fit of apoplexy, and was paralysed on one side. The doctor who attended on him, says that his tongue and throat were also partially paralysed. He tells us that he attended on him till the end of November and during that time his physical condition remained unchanged, though his mental condition improved. He tells us that, at first, he was only semi-conscious, but that he gradually improved. And he tells us that on the day when the Sub-Registrar went there for the purpose of registering the second will, he was invited to give an opinion as to the mental capacity of the deceased man, and that he declined to do so and dictated to the (Sub.) Registrar what he would say and in doing so went as far as he could go. This is what he says in exhibit F; 'I have known Tiruvengada Mudaliar for the last six weeks or so. He came under my care about the beginning of this month. I have been present today at the enquiry into the execution of a will presented by him and have heard his answers thereto. They have been given by him in a conscious state of the mind.' That, he says, is as far as he could go with a view to giving an opinion as to his mental capacity. He says 'when I was asked by the Registrar, suggestions were made that he was of testamentary capacity. They wanted me to certify to his mental state. I declined and said I would only say he was conscious. I declined to make any further statement. I did so because of my observation of the patient. I only mean that he was conscious as distinct from unconscious. The questions I had put to him showed only that he was conscious. No one suggested that a will was going to be executed before I was asked to attest it. Deceased never told me a word about it. He never opened his mouth to me. His tongue and throat were partly paralysed. His articulation was faint and slow. He could do nothing. He was quite bed-ridden. Unless some one helped him he could do nothing. My attestation means only that I saw it signed, and nothing more.' . . . By saying he was conscious on the third day I mean he ceased to be unconscious. I don't remember attesting any power-of-attorney or other document. To his own Counsel in re-examination he says 'I dictated to the Sub-Registrar. I went as far as I could and put it in my own words. I could not form any opinion as to the state of his mind at the time the second will was executed. So far as I questioned him and the Sub-Registrar his replies were monosyllabic and rational because he was not insane.' That is the evidence with regard to the state of mind of the deceased man at the time, *i.e.*, eight days later than the latest will which has to be propounded. He had an apoplectic stroke on the 3rd. The first will was executed on the 11th and the second

will is supposed to have been executed on the 18th and the date of its registration is the 26th October. The testator's mental condition had improved daily and yet the best the doctor can say with regard to his state of mind then is that he was conscious. Curiously enough, on the 17th, the day before the second will is executed and some days after the first will had been registered, there is received in the Sub-Registrar's office an application to register the second will. It cannot be suggested that there may be some mistake about the date it bears for it also bears the stamp of the Sub-Registrar's office of the 17th October. This application has been signed and dated the 17th October in ink by somebody, who apparently received it, and marked 2-20 P.M. It bears the stamp of the Sub-Registrar's office of the same date. And upon that application some body appears to have attended and there is this writing at the bottom. 'Attended at 5 P.M. on the 20th October 1903. The party (executant) was found unconscious and so no document was registered. 21—10—03.'

"Here the party propounding the will is the party benefited by the will. He is not the person who, in ordinary circumstances, would be a person to be provided for by the deceased. He is a sister's son, but the deceased has brothers and nephews and other closer relations. The only persons benefited are the plaintiff, who propounds the will and the plaintiff's relations: his wife's sister and her daughter"

After going through the evidence of the plaintiff and Srinivasa Chari which was to the effect that the testator had no difficulty in giving his own instructions for the will and in executing it with little or no assistance from any one. The judgment concluded.

"There were several other people then present, who could have been called; but they have not been called and it may be for a very good reason, I do not know. All I can say is that, with the exception of the evidence of Vijiaraghavalu, the doctor, there is absolutely no evidence at all that one can say 'I believe this witness is telling me the truth with regard to the state of mind and what it was at the time the will was executed.' As regards the evidence of Dr. Browning he was not there at the time and he declines to say anything as to his state of mind when he was not there. Moreover the utmost he can say is that when he saw him he might have made a simple will but Dr. Browning in saying that did not know the legal requirements of a person's mind when he makes his will. In these circumstances I am utterly unable to say that the plaintiff has satisfied me that this man was of a sound and disposing mind when he executed the will either of the 11th or of the 18th. If the facts were satisfactorily proved it would be a matter then to discuss as to

the extent of the capacity of the deceased's mind. The facts are not to my mind satisfactorily proved at all. The only thing I am perfectly clear about is that the story as told by Srinivasachari and the plaintiff is not true, and that the deceased man, if the evidence of the Sub-Registrar and the doctor is true, was not in a state of mind, or possessed the physical capacity, to give the instructions in the way they say he gave them or to execute the documents which they say he executed then."

Mr Justice Boddam accordingly made a decree dismissing the application for probate with costs.

The Appellate Court (Mr. Justice SUBRAHMANIA AYYAR and Mr. Justice BENSON) after admitting further documentary evidence, and on a consideration of that and of the evidence already given decided that the testator was of sound disposing mind when he executed the will and codicil. They summed up their conclusions as follows:—

"The conclusion that we draw from the medical evidence as a whole is that the disability of the testator was mainly physical, not mental. We have already stated that the dispositions of the will were such that they could have been communicated by very few and simple words, and we are of opinion that the persons who made the draft could have had no difficulty in following the instructions of the testator and embodying them, as they did in the will and codicil, and that the testator was in a condition to fully understand the documents when read over to him, and to signify his approval or disapproval of them. Though, no doubt, both the plaintiff and the vakil in their evidence seem to give an exaggerated account of the capacity of the testator to express himself by words, and though the evidence of the plaintiff, as an interested party, must be accepted with caution, yet we see no reason to treat the vakil as an untruthful witness when he states that the will was prepared by him from instructions given to him directly by the testator himself. That the vakil had previously been doing legal work for the testator is beyond question. That he enjoyed his confidence is clear from the fact that he was employed to represent his interest in the friendly arbitration which effected the partition. He was therefore the natural person to be called in to make the will, and he would be unlikely to be guilty of a fraud in connection with it. The fact that another person was employed to prepare the draft of the codicil, goes far to negative the idea of any conspiracy between the vakil and the plaintiff. Moreover the case does not rest altogether on this testimony, for both the will and the codicil were duly registered on the 14th and the 26th October,

respectively. We do not see the slightest ground for regarding the Sub-Registrar as other than a perfectly unbiassed witness, and it was his duty before registering the document to satisfy himself as to the mental competency of the executant both at the time of execution and at the time of registration.

"As to the man who was in temporary charge of the Registration office for a few days in the interval between the 14th and 26th October, and who made a remark in one of his registers that on the 20th October he went to register the will but found the testator unconscious, we do not attach any importance to that statement. Being dead at the time of the trial, he was not examined as a witness in the case. It is nowhere shown that he actually saw the testator on the 20th and as both the medical men visited the testator on that day and did not find him unconscious, it is clear that the statement referred to does not affect the case.

"Intrinsic confirmation of the Sub-Registrar's evidence is afforded by several signatures made by the testator in the course of the registration proceedings, and these signatures we have no hesitation in saying were made by the same hand that signed the will and the codicil.

"It remains to add that at the end of November the testator registered a power-of-attorney in favour of the plaintiff empowering him to manage the property, and to alienate part of it to enable the testator's debts to be discharged, and in pursuance of this the plaintiff did actually sell certain villages for the sum of Rs. 18,000 to Ramakrishna, the cousin of the testator, already mentioned.

"It is admitted that the defendant used to visit the testator who was his own brother from the time he fell ill in October 1903 until his death on 10th February 1904, the last visit being paid on 9th February. It is in evidence that the defendant tried to remove the testator from Madras to the defendant's own residence in the country. It is also in evidence that the defendant's son used to attend on the testator. In these circumstances and looking to the fact that the documents were registered, it is difficult to believe that the defendant was not aware of the existence of the documents or that, if any deception were practised on the testator in connexion with them, the defendant would not have brought it to the notice of the testator, and got the documents cancelled.

"In conclusion we may notice that the documents which we admitted in evidence at the hearing of the appeal, show that in November 1903 the defendant's vakil called upon the testator by a registered notice to intimate his disclaimer of interest in certain arrears of rent for which the defendant was suing and used a reply

sent the day before the testator's death as evidence of such disclaimer. This implies that the defendant knew that the testator was then capable of attending to business and was not unconscious as the defendant in his evidence pretended.

"In these circumstances we feel that we are unable to arrive at the same conclusion as the learned Judge with regard to the competency of the testator. We find that he was fully aware of the extent of his property, of the objects of his disposition, and the nature of the disposition."

The Appellate Court consequently reversed the decision of the Court below and made a decree directing that the will and codicil be admitted to probate.

On this appeal—

Sir *R. Finlay*, *K.C.*, and *De Gruyther*, *K.C.*, for the appellant contended that the evidence on the record was not sufficient to establish that the testator was of sound disposing mind at the times of the alleged execution of the will and codicil. To satisfy the Court that he was so, the onus was on the respondent who propounded the will and codicil, and he had not discharged it. Reference was made to *Barry* v. *Butlin*(1); and the Registration Act (III of 1877), section 63.

Cohen, *K.C.*, and *Kenworthy Brown* for the respondent contended that the will and codicil were on the evidence proved to have been duly executed by the testator having at the time a sound disposing mind. Though physically infirm the testator might have had sufficient mental capacity to understand what he was doing and to carry out his intentions. *Sajid Ali* v. *Ibad Ali*(2); and the Registration Act (III of 1877), sections 63 and 71 were referred to; and it was submitted that the High Court decree was right.

Sir *R. Finlay*, *K.C.*, replied.

1909, *July 20th*.—The judgment of their Lordships was delivered by

LORD COLLINS.—This is an appeal from an Appellate decree of the High Court of Madras reversing a decree of Boddam, J., sitting on the Original Side of the High Court, who dismissed an application by the plaintiff (the present respondent) for probate of a will purporting to have been executed by one Thiruvengada Mudaliar on the 11th October, 1903, and a codicil thereto of the 18th October, 1903.

(1) (1838) 2 Moore, P.C., 480. (2) (1895) I.L.R., 23 Calc., 1; L.R., 22 I.A., 171.

The only issues were:—

(1) Was the testator, when he executed the will of the 11th October 1903, of sound disposing mind?

(2) Was the testator, when he executed the codicil of the 18th October 1903, of sound disposing mind?

The onus was admittedly on the plaintiff, who propounded the will and codicil, to make good the affirmative in each case.

The learned Judge, who heard and saw the witnesses, held that he had entirely failed to do so.

The Court of Appeal who suffered under the disadvantage of neither seeing nor hearing the witnesses, nevertheless held that the onus on the plaintiff had been discharged, and admitted the will and codicil to probate.

It is not disputed that the learned Judge correctly laid down for his own guidance the essentials of "a sound and disposing mind." For reasons which he gives, he was unable to place any reliance on the persons called who were present on the 11th October at the signing of the will, except the native doctor, who was one of the attesting witnesses. This gentleman's evidence, a great part of which is set out in the judgment, entirely justifies, in their Lordships' opinion the view taken by the learned Judge, that it left the onus on the plaintiff quite undischarged, with the necessary consequence that, in the absence of other reliable evidence, the learned Judge had no alternative but to dismiss the application. Certainly no other medical evidence was forthcoming sufficient to turn the scale. Dr. Browning, the only other medical witness, had declined to see the testator with a view to witnessing his will, and says in evidence:—

"If what they say is true, that he had an attack of apoplexy on the 3rd, I should think it doubtful if he could have dictated a will like that [*i.e.*, of the 11th October]. I am not prepared to say he could."

As to the attack of apoplexy, there can be no possible doubt, for it was not disputed at the trial. As the result therefore, of the medical evidence the onus is very far from shifted. The chief point made by the Court of Appeal against the decision of the Trial Judge is that he confounded physical with mental incapacity. But, in their Lordships' opinion, there is no sufficient foundation for this imputation. It really arises from the fact that the learned Judge dwelt upon the proved physical infirmities of the testator in limb and speech as entirely discrediting the account

given by the plaintiff and the witness Strinivasa Chariar of what took place on the 11th and 18th October, a conclusion which, in their Lordships' opinion, was entirely just. No doubt it is always difficult for judges who have not seen and heard the witnesses to refuse to adopt the conclusions of fact of those who have (see the observations of Lindley, M.R., in *Coghlan* v. *Cumberland*(1); but that difficulty is greatly aggravated where the Judge who heard them has formed the opinion, not only that their inferences are unsound on the balance of probability against their story, but that they are not witnesses of truth, and that was the inference which Boddam, J., drew with regard to some of the material witnesses for the plaintiff in this case.

The Court of Appeal seem to have attached some weight to a suggestion that the testator was on bad terms with his brother, his nearest male relative and heir. But this suggestion is displaced by the letters which were produced, showing the affectionate terms on which they corresponded.

The Court of Appeal also seem to attach too much weight to the fact that the defendant's vakil advised that formal notice should be sent to the testator shortly before his death, demanding a disclaimer of interest in certain arrears of rent in respect of property which had fallen to the defendant 's share on a family division. Even if the defendant appreciated its significance, it was no more than an attempt under the advice of his lawyer to cure a technical blot as a measure of precaution in a legal process.

Their Lordships are of opinion that Boddam, J., was right in holding that the plaintiff had failed to discharge the burden of proof.

They will, therefore, humbly advise His Majesty that the appeal should be allowed, the Appellate decree of the High Court set aside with costs, and the decree of Boddam, J., restored.

The respondent will pay the costs of the appeal.

Appeal allowed.

Solicitor for the appellant *Douglas Grant.*

Solicitors for the respondent *Chapman, Walker and Shephard,*

J.V.W.

(1) (1898) L.R., 1 Ch., 705.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Wallis, Mr. Justice Munro and Mr. Justice Sankaran-Nair.

1908. September 24, 29. 1909. January 4, 5 and 12. April 16.

PULAKA VEETIL MUTHALAKULANGARA KUNHU MOIDU AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

THIRUTHIPALLI MADHAVA MENON AND OTHERS (DEFENDANTS NOS. 2 TO 12), RESPONDENTS.*

Transfer of Property Act IV of 1882, s. 59—Evidence Act, s. 68—Mortgage registered or unregistered not duly attested admissible to prove personal covenant to pay.

A mortgage, which is not attested or attested by only one witness is admissible as evidence of a personal covenant to pay contained therein, whether such mortgage is registered or unregistered.

Madras Deposit and Benefit Society v. *Oonnamalai Ammal*, [(1895), I.L.R., 18 Mad., 29], overruled.

Sadakavaur v. *Tadepally Basaviah*, [(1907), I.L.R., 30 Mad., 284, at p. 288], followed.

A document which purports to be a mortgage, but is not a mortgage owing to noncompliance with the provisions of section 59 of the Transfer of Property Act regarding attestation, is not a document which is required by law to be attested within the meaning of section 68 of the Evidence Act, and is admissible to prove the personal covenant to pay therein, which is not required by law to be attested.

SECOND APPEAL against the decree of S. Raghunathaya, Subordinate Judge of South Malabar at Palghat, in Appeal Suit No. 303 of 1905, presented against the decree of A. Sreenivasa Ayyangar, District Munsif of Chowghat, in Original Suit No. 278 of 1904.

The facts necessary for the purpose of the report are sufficiently set out by (Sir Arnold White, Chief Justice, and Abdur Rahim, J.) in the order of reference to a Full Bench which was as follows:—

ORDER OF REFERENCE TO A FULL BENCH.—In this case the question has arisen whether a certain document (Exhibit A) which the defendant contends is a mortgage (and which for the purposes of this order of reference, we assume to be a mortgage) although not

* Second Appeal No. 162 of 1906.

admissible in evidence as a mortgage since it was not attested or registered, is admissible as evidence of a personal covenant to repay. In *Gomaji* v. *Subbarayappa*(1) it was held that a mortgagee was entitled to sue on the personal covenant contained in an unregistered mortgage deed. It would appear from the report of *Madras Deposit and Benefit Society, Limited* v. *Oonnamalai Ammal*(2) that the mortgage deed in question in *Gomaji* v. *Subbarayappa*(1) though unregistered had been duly attested. In *Madras Deposit and Benefit Society, Limited* v. *Oonnamalai Ammal*(2), this Court held that an unattested mortgage deed was not admissible as evidence of a personal covenant, the ground of the decision being that the document itself was excluded under the provisions of section 68 of the Indian Evidence Act. In *Tofaluddi Peada* v. *Mahar Ali Shaha*(3) a registered mortgage deed which had been attested by one witness was held admissible as evidence of a personal covenant. Mr. Gour in his work on the Transfer of Property in British India states (page 266) that *Madras Deposit and Benefit Society, Limited* v. *Oonnamalai Ammal*(2), was dissented from in the Calcutta decision referred to above. It does not appear, however, in the report of the Calcutta case that the attention of the Judges was called to the Madras decision.

In *Sadakavaur* v. *Tadepally Basaviah*(4), Sir Subramania Aiyar said, "It is necessary to observe that the case of *The Madras Deposit and Benefit Society, Limited* v. *Oonnamalai Ammal*(2) goes too far in holding that noncompliance with the rule laid down in section 59 of the Transfer of Property Act as to attestations by witnesses to an instrument of mortgage of immoveable property renders the personal covenant to pay the debt void. It is difficult to see how noncompliance with the provisions of that section relating to *a transfer of an interest in immoveable property* by way of mortgage can have any further effect than to invalidate such intended transfer. With reference to bonds for money which purported also to mortgage immoveable property for the debts, but which were not registered as required by the Registration Act, it was held by all the High Courts that the non-registration did not affect the validity of the contract to pay the debt. I can see no real difference between the two cases. I think, therefore, the

(1) (1892) I.L.R., 15 Mad., 253.
(2) (1895) I.L.R., 18 Mad., 29.
(3) (1899) I.L.R., 26 Calc., 78.
(4) (1907) I.L.R., 30 Mad., 284.

decision of Maclean, Chief Justice, and Banerjee, J., in *Tofaluddi Peada* v. *Mahar Ali Shaha*(1), where they took a view different from that held in *Madras Deposit and Benefit Society, Limited* v. *Oonnamalai Ammal*(2), lays down the correct rule."

We are disposed to think that the view taken by Sir Subramania Aiyar is right and that the decision in *Madras Deposit and Benefit Society, Limited* v. *Oonnamalai Ammal*(2) is not good law.

We accordingly refer the two following questions for the decision of a Full Bench:—

(1) Is a registered mortgage which has not been attested, or has only been attested by one witness, admissible as evidence of a personal covenant contained therein ?

(2) Is an unregistered mortgage which has not been attested, or has only been attested by one witness, admissible as evidence of a personal covenant contained therein ?

The case again came on for hearing in due course before the Full Bench constituted as above.

K. P. M. Menon for appellants.

G. S. Ramachandra Ayyar for *T. R. Ramachandra Ayyar* for second and fourth respondents.

When the Court expressed the following :—

OPINION (WALLIS, J.).—Section 59 of the Transfer of Property Act provides that a mortgage can only be effected by a registered instrument signed by the mortgagor and attested by two witnesses. It follows from the provisions of this section that an instrument which is not registered or attested as required by the section is not a mortgage or relevant evidence of a mortgage. If, however, a document which purports to be a mortgage but cannot take effect as a mortgage for want of registration or due attestation also contains a covenant to pay, is there anything to prevent such document being given in evidence in a suit on the contract to pay? This is in effect the question raised in the reference, and it resolves itself into the further questions whether such a document is rendered inadmissible as evidence of the contract to pay for want of registration by virtue of section 49 of the Indian Registration Act, 1877, or for want of attestation by virtue of section 68 of the Indian Evidence Act, 1872. In my opinion it is now well settled that want of registration will not render such document

(1) (1899) I.L.R., 26 Calc., 78. (2) (1895) I.L.R., 18 Mad., 29.

inadmissible in evidence in proof of the contract to pay. See the Full Bench decision in *Ulfatunnissa Elahijan Bibi* v. *Hosain Khan*(1), followed in *Gomaji* v. *Subbarayappa*(2).

As to whether it is rendered inadmissible for want of attestation, it may be observed that section 68 of the Indian Evidence Act reproduces the English rule since the passing of section 26 of the Common Law Procedure Act, 1854, which modified the old common law rule that when a document had been attested it must be proved by an attesting witness whether or not attestation was necessary to the validity of the document, and provided that it should "not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite." With section 68 must be also read section 72 which provides that "an attested document not required by law to be attested may be proved as if it was unattested" thus expressly excluding the old common law rule. In *Madras Deposit and Benefit Society, Limited* v. *Oonnamalai Ammal*(3), it was held that section 68 rendered a document such as that now in question inadmissible as evidence of the contract to pay because it purported to be a mortgage and a mortgage was required by law to be attested. This ruling was dissented from in *Sonatun Shaha* v. *Dino Nath Shaha*(4), on the ground that such a document in so far as it created a mere personal or money liability is not required by law to be attested and so not within the section. There is another ruling to the same effect in *Tofaluddi Peada* v. *Mahar Ali Shaha*(5) with which Subrahmania Ayyar, J., expressed his concurrence *obiter* in *Sada Kavaur* v. *Tadepally Basaviah*(6). I agree with the referring Judges that this is the right view. Provisions such as section 68 must be construed strictly, and a document, which purports to be a mortgage but is not a mortgage owing to the provisions of section 59, Transfer of Property Act, because it is not duly attested, is not in my opinion a document which "is required by law to be attested" within the meaning of the section, and there is therefore nothing to prevent its being admitted in evidence in proof of the contract to pay therein contained which is not required by law to be

(1) (1888) I.L.R., 9 Calc., 520. (2) (1892) I.L.R., 15 Mad., 253.
(3) (1895) I.L.R., 18 Mad., 29. (4) (1899) I.L.R., 26 Calc., 222.
(5) (1899) I.L.R., 26 Calc., 78. (6) (1907) I.L.R., 30 Mad., 284. at p. 288.

attested. If it were tendered as proof of a mortgage it would, as already pointed out, be irrelevant by virtue of section 59, Transfer of Property Act, and so inadmissible independently of section 68 of the Evidence Act; and as appears from the history of that section its scope or purpose is to provide the mode of proving duly attested documents rather than to deal with the consequences of non-attestation as to which the terms of the enactment requiring attestation have to be considered. As to the decision in *Veerappa Kavundan* v. *Ramasami Kavundan*(1) that a plaintiff suing on a duly attested mortgage who fails to call an attesting witness is not entitled to prove the deed otherwise for the purpose of enforcing the covenant to pay, it is sufficient to say that the document in that case being a duly attested mortgage was a document "required by law to be attested" within the meaning of section 68, whereas in my opinion the section does not apply to such a document as we are now considering. In the result I would answer both the questions referred to us in the affirmative.

MUNRO, J.—It must, I think, be taken to be settled law that a document which contains a personal covenant to pay a debt and which purports to mortgage immoveable property as security for the debt is, if attested by two witnesses as required by section 59 of the Transfer of Property Act, admissible in evidence to prove the personal covenant, notwithstanding the fact that it is not registered —vide *Gomaji* v. *Subbarayappa*(2), *Sadakavaur* v. *Tadepally Basaviah*(3) and *Ulfatunnissa Elahijan Bibi* v. *Hosain Khan*(4). Is such a document admissible in evidence to prove the personal covenant even if not attested by two witnesses? I shall first deal with the case where the document is not attested at all. In *Madras Deposit and Benefit Society, Limited* v. *Oonnamalai Ammal*(5) it was held that such an unattested document was inadmissible in evidence to prove the personal covenant. In *Tofaluddi Peada* v. *Mahar Ali Shaha*(6) and *Sonatun Shaha* v. *Dino Nath Shaha*(7) the opposite view was taken, and in the latter case *Madras Deposit and Benefit Society, Limited* v. *Oonnamalai Ammal*(5) was expressly dissented from. In *Sada*

(1) (1907) I.L.R., 30 Mad., 251.
(2) (1892) I.L.R., 15 Mad., 253.
(3) (1907) I.L.R., 30 Mad., 284, at p. 288.
(4) (1883) I.L.R., 9 Calc., 520.
(5) (1895) I.L.R., 18 Mad., 29.
(6) (1899) I.L.R., 26 Calc., 78.
(7) (1899) I.L.R., 26 Calc., 222.

Kavaur v. *Tadepally Basaviah*(1), Subrahmania Ayyar, J., concurred with the view taken in the Calcutta cases. The decision in *Madras Deposit and Benefit Society, Limited* v. *Oonnamalai Ammal*(2) is based upon section 68 of the Indian Evidence Act. It assumes that that section applies in the case of documents of the kind under consideration. Now section 68 lays down that, if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. This language to my mind clearly implies that to make section 68 applicable the document must on its face purport to be attested. Section 69 makes the matter still clearer. It provides that, if no such attesting witness can be found, it must be proved that the attestation of one attesting witness at least is in his handwriting. Section 68 has therefore no application in the case of a document which is not attested at all, and *Madras Deposit and Benefit Society, Limited* v. *Oonnamalai Ammal*(2) was in my opinion wrongly decided. Further consideration of section 68 leads to the conclusion that a document to which it applies must not only be attested, but must be attested to the extent required by law. For the section distinctly contemplates that the document, after being proved in the manner laid down, may be used as evidence of every right which it purports to create. Now a document which, for example, purports to create a mortgage cannot be used as evidence of the mortgage unless it is attested by two witnesses as required by law. Such a document therefore if attested by only one witness or not attested at all does not come under the section. The same view is taken in *Veerappa Kavundan* v. *Ramasami Kavundan*(3) where it is stated that section 68 obviously applies only to a case where an instrument, required by law to be attested, bears the necessary attestation. I would therefore answer both the questions referred to us in the affirmative.

SANKARAN-NAIR, J.—I would answer both the questions in the affirmative. I have nothing to add to the judgments of my learned colleagues.

(1) (1907) I.L.R., 30 Mad., 284, at p. 288.
(2) (1895) I.L.R., 18 Mad., 29.
(3) (1907) I.L.R., 30 Mad., 251.

WALLIS, MUNRO AND SANKARAN-NAIR, JJ.

PULAKA VEETIL MUHALAKU-LANGARA KUNHU MOIDU v. THIRUTHI-PALLI MADHAVA MENON.

The second appeal again came on for hearing before (Sir Arnold White, C.J., and Abdur Rahim, J.) when the Court delivered the following judgment :—

JUDGMENT.—In accordance with the decision of the Full Bench we set aside the decrees of the lower Courts, allow the appeal and give the plaintiffs a decree for the amount claimed with interest at 6 per cent. from date of plaint till payment. No issue was taken in the lower Appellate Court as to the genuineness of the document. This question cannot therefore be now raised.

The defendants disputed the genuineness of the document in the Court of First Instance. The plaintiffs are entitled to their costs throughout.

APPELLATE CIVIL—FULL BENCH.

Before Mr. Justice Wallis, Mr. Justice Munro and Mr. Justice Sankaran-Nair.

1908. November 17, 24. 1909. January 5. April 16, 21, 22.

CHENNA REDDI (PLAINTIFF), APPELLANT,

v.

PEDDAOBI REDDI AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, *s.* 623—*Jurisdiction of Court to hear review not taken away by the presentation of an appeal.*

Where an application for review has been presented by a party to a suit and an appeal is afterwards preferred, the Court to which the application for review is made is not thereby deprived of jurisdiction to entertain the application.

Ramanadhan Chetty v. *Narayanan Chetty*, [(1904) I.L.R., 27 Mad., 602], overruled.

SECOND APPEAL against the decree of M. J. Murphy, District Judge of Kurnool, in Appeal Suit No. 50 of 1905, presented against the decree of V. V. S. Avadhani, District Munsif of Gooty, in Original Suit No. 564 of 1903.

The second appeal first came on for hearing before (Sir Arnold White, C.J., and Abdur Rahim, J.), who made the following Order of Reference to a Full Bench which was as follows :—

ORDER OF REFERENCE TO A FULL BENCH.—In this case the plaintiff on the 31st October 1904 put in a review petition against

* Second Appeal No. 314 of 1906.

WALLIS, MUNRO AND SANKARAN-NAIR, JJ.

CHENNA REDDI v. PEDDAOBI REDDI.

the Munsif's decree with regard to one of the items of his claim as to which the decree was against him. On the 23rd November 1904 the defendants appealed as regards two items of the claim as to which the decree was in the plaintiff's favour. On the 5th December 1904 the Munsif gave judgment on the plaintiff's review application in the plaintiff's favour. On the 16th December notice of the appeal was served on the plaintiff.

It was held in *Ramanadhan Chetty* v. *Narayanan Chetty*(1) that, where a party put in an application for review and, himself, subsequently preferred an appeal, the Court to which the review application had been presented, had no jurisdiction to deal with that application. There can be no doubt that the grounds of the decision in *Ramanadhan Chetty* v. *Narayanan Chetty*(1) are applicable to the facts of the present case.

With regard to *Ramanadhan Chetty* v. *Narayanan Chetty*(1) however, it may be said that the plaintiff by himself preferring his appeal after he had presented his review application elected to proceed by way of appeal, and having done so, was precluded from proceeding by way of review, and assuming the case to have been rightly decided, the present case may perhaps be distinguished on that ground.

We refer the following questions to a Full Bench :—

(1) Was *Ramanadhan Chetty* v. *Narayanan Chetty*(1) rightly decided ?

(2) If so, where in a suit a review application is presented by a party and an appeal is subsequently preferred by the other side, has the Court to which the review application was presented jurisdiction to hear that application ?

The case again come on for hearing in due course before the Full Bench constituted as above.

H. Sitaramaswami for *P. R. Sundara Ayyar* for appellant.

A. Krishnaswami Ayyar for the Hon. Mr. *V. Krishnaswami Ayyar* for respondents.

The Court expressed the following opinion :—

OPINION (WALLIS, J.).—This reference raises the question whether when an application for review of judgment has been made prior to the filing of an appeal, and, an appeal is filed subsequently, the Court is precluded from proceeding to hear the

(1) (1904) I.L.R., 27 Mad., 602.

application for review as held in *Ramanadhan Chetty* v. *Narayanan Chetty*(1). Section 623, Civil Procedure Code, provides for making an application for review before an appeal has been filed, and sections 624 and 630 provide that the Court is either to reject the application or to grant it and rehear the case. The Legislature has thus conferred upon the party a right to apply for review and upon the Court jurisdiction to entertain the application, and has directed how it shall be dealt with. When a right and a jurisdiction are conferred expressly by statute in this way it appears to me that they cannot be taken away or cut down except by express words or necessary implication. There are no express words and the question therefore is, is there any necessary implication? No such implication arises from the terms of section 623 itself which provides, by way of exception, that, in certain cases, an application for review may be made even after an appeal has been filed and if the Court can proceed to hear such an application why not also an application made before the filing of an appeal? No such necessary implication arises in my opinion from the other provisions of the Code such as section 545 which provides that the filing of an appeal shall not operate as a stay of execution, or section 550 which provides for the transmission of papers to the Appellate Court, or from section 582 which provides that the Appellate Court in appeals shall have the same power and, as near as may be, perform the same duties as are conferred or imposed by the Code on Courts of Original Jurisdiction in respect of suits instituted under the Code, because it does not seem to me to follow necessarily from these provisions that a Court is precluded from proceeding to dispose of an application for review properly filed before it owing to an appeal having been filed subsequently. The decision in *Ramanadhan Chetty* v. *Narayanan Chetty*(1) is based on the proposition that on the filing of an appeal the further litigation and all matters connected therewith are transferred to and placed under the control of the Appellate Court, and in support of this proposition certain American decisions are referred to. Now, after an appeal has been filed, the Appellate Court is seized of the case and should no doubt be applied to rather than the Court of First Instance unless the law expressly enjoins the contrary, as was held in *Pichuvayyangar* v. *Seshayyangar*(2); but

(1) (1904) I.L.R., 27 Mad., 602. (2) (1895) I.L.R., 18 Mad., 214.

it is a very different thing to press this principle so far as to say that the act of a party in filing an appeal deprives the Court of First Instance of power to dispose of an application which has been properly made to it in the exercise of its jurisdiction. Such a notion would never, I think, have occurred to the framers of the Code. They were English lawyers engaged in conferring upon Indian Courts, subject, no doubt, to modifications and restrictions, jurisdiction to grant relief by way of review of judgment similar to that which had been exercised by Courts of Equity in England and by the Supreme Courts in the exercise of their equitable jurisdiction. It is only necessary to refer to what is said in Mitford's 'Pleadings in Chancery,' 5th edition, page 101, on bills of review or to the observations of Cozens Hardy, L.J., in *Bright* v. *Sellar*(1) to see that section 623 contains an adaptation of the practice as to bills of review in equity. Not only is there no warrant for the notion that the filing of an appeal deprived the Court of Jurisdiction to proceed further with a bill of review but it was even held that a bill of review might be filed after the affirmance of the decree by the Appellate Court, Mitford, page 105. If the framers of the Code had intended to introduce any such rule I think they would have said expressly not only that application for review should not ordinarily be made after the filing of an appeal, but also that the filing of an appeal should determine the jurisdiction to dispose of applications made before the filing of the appeal. On the whole it seems to me impossible to hold that there is any necessary implication that the filing of an appeal operates as a stay of proceedings on an application for review, especially as section 623 itself provides for making certain applications for review even after the filing of an appeal. If there is no necessary implication we cannot hold that the Court is precluded from proceeding with the review merely on the ground that it might be convenient so to hold.

Now, as to authority, it was held by Sir Barnes Peacock and a Full Bench of the Calcutta High Court under section 376 of the Code of 1859 to be "clear that if a review be applied for in proper time and before an appeal has been preferred the Judge is not prevented from proceeding upon the application for review by the subsequent presentation of an appeal and he has full power

(1) (1904) I K.B., 6.

and is bound to proceed under the application for review." It is true that in that case the appeal had been withdrawn before the review was disposed of but the Court did not choose to rely on that ground, but preferred to lay down in the terms already quoted the general proposition that the review proceedings were not affected by the subsequent filing of the appeal. The proposition there laid down does not appear to have been questioned until *Ramanadhan Chetty* v. *Narayanan Chetty*(1). The Allahabad High Court in *Kanhaiya Lal* v. *Baldeo Prasad*(2) has assumed that a review could go on after the filing of an appeal, and held that, where the review succeeded and a new decree was framed, the decree under appeal was superseded and the appeal could not be heard. As regards the observations of the Privy Council in *In the matter of Candas Narrondas, Navivahu* v. *Turner*(3) there is, I think, no ground for holding that these observations were made with reference to section 623, Civil Procedure Code, as there is nothing to show that any application had been made for review or that such application was made prior to the filing of the appeal. We have also been referred to the decision in *Sankara Bhatta* v. *Subraya Bhatta*(4) to which I was a party, in which the principle laid down in *Ramanadhan Chetty* v. *Narayanan Chetty*(1) was applied to an application under section 108, Civil Procedure Code, but no question arose or was considered in that case as to the present point.

In answer to the questions referred to us I am of opinion that *Ramanadhan Chetty* v. *Narayanan Chetty*(1) was wrongly decided and that, where an application for review is presented by a party and an appeal is afterwards preferred, the Court to which the application for review was made is not thereby deprived of jurisdiction to entertain the application. These are the only questions referred to us and I need not consider how far, in disposing of the application, the Court may take into account if brought to its notice the fact that an appeal has been filed, but I am inclined to think that in such a case the observations of Cotton, L.J., in *ex-parte* Banco De Portugal(5) may be applicable, and that the jurisdiction ought to be exercised with the greatest care and only in a very strong case.

(1) (1904) I.L.R., 27 Mad., 602.
(2) (1906) I.L.R., 28 All., 240.
(3) (1889) I.L.R., 13 Bom., 520.
(4) (1907) I.L.R., 30 Mad., 535.
(5) (1880) L.R., 14 Ch. D., 1.

MUNRO, J.—I am of the same opinion.

SANKARAN-NAIR, J.—I agree.

The second appeal again came on for final hearing before (Sir Arnold White, C.J., and Abdur Rahim, J.) when the Court delivered the following judgment :—

JUDGMENT.—In accordance with the decision of the Full Bench the decree of the lower Appellate Court is set aside and the case is remanded to that Court to be disposed of according to law. Costs will abide the event.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

VALASUBRAMANIA PILLAI (SECOND DEFENDANT), APPELLANT, 1908. November 18.

v.

S. V. R. R. M. RAMANATHAN CHETTIAR AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 1 AND 3 TO 7), RESPONDENTS.*

Limitation Act Act XV of 1877, s. 21—Part-payment by one partner will save limitation only if made under authority from the other partners.

A part-payment by one partner of a going mercantile firm of a debt due by the firm will not save the operation of limitation under section 21 of the Limitation Act XV of 1877 against the other partners, in the absence of evidence to show that, in the course of business, the partner who made the payment had authority to do so on behalf of the firm.

Premji Ludha v. *Dossa Doongersey*, [(1886) I.L.R., 10 Bom., 358 at p. 362], referred to.

SECOND APPEAL against the decree of W. W. Phillips, District Judge of Tinnevelly, in Appeal Suit No. 55 of 1905, presented against the decree of Syed Tajuddin Saheb, District Munsif of Tinnevelly, in Original Suit No. 141 of 1904.

Suit on a promissory-note executed on 24th May 1898 by the first defendant's husband, the third defendant and the sixth defendant who were partners in trade. The second defendant was the undivided brother of the first defendant's husband, defendants Nos. 4 and 5 the undivided sons of third defendant

* Second Appeal No. 46 of 1906.

and the seventh defendant the undivided son of the sixth defendant. On the 14th February 1901 a payment in partial discharge of the note was made by the sixth defendant and endorsed on the note; but for such payment and endorsement the suit would have been time-barred.

The District Munsif held that the suit was barred as against defendants Nos. 1 to 5 and passed a decree against the sixth and seventh defendants alone.

On appeal, the District Judge held that the part-payment was binding on all the defendants and granted a decree against all the defendants.

The second defendant appealed to the High Court.

K. Srinivasa Ayyangar and *R. Rangaswami Ayyangar* for appellant.

The Hon. the Advocate-General for respondent.

JUDGMENT.—We are unable to adopt the view expressed by the learned Judge in paragraph 4 of his judgment that, in the absence of any evidence to the contrary, a part-payment by one partner of a debt due by the firm must be an act necessary for, or usually done, in carrying on the business of the firm, and is therefore binding on the other partners.

As we read section 21 of the Limitation Act there must be evidence of some fact over and above the fact that the payment is made by a partner to show that the partner making the payment had authority to do so on behalf of the other partners, before another partner can be held chargeable by reason of the payment. It seems to us that the observation of Scott, J., in *Premji Ludha* v. *Dossa Doongersey*(1) that in a going mercantile concern such agency is to be presumed as an ordinary rule is merely a dictum and in our view it is necessary, in order to take the case out of section 21 of the Limitation Act, to show something more than the fact that the partner who made the payment is a partner in a going mercantile concern. There must, in our opinion, be some evidence that, in the course of business, the partner who had made the payment had authority to do so on behalf of the firm. In the present case we can find no such evidence. The payment was made by the sixth defendant individually and did not purport to have been made on behalf of the firm. The plaintiff's accountant

(1) (1886) I.L.R., 10 Bom., 358, at p. 362.

stated in his evidence that the sixth defendant made the payment from the funds of the joint shop and that the shop accounts contained an entry of the payment. The accounts not having been produced the statement as to what they contained was of course not evidence, and we are not prepared to hold on the strength of the statement of this witness that the amount was paid from the funds of the shop and that the sixth defendant was in fact authorized by the other members of the firm to make the payment so as to render them chargeable.

The decree of the lower Appellate Court must be set aside so far as the second defendant, appellant, is concerned. The plaintiff must pay the costs of the second defendant in this Court and in the lower Appellate Court.

APPELLATE CIVIL.

Before Mr. Justice Sankaran-Nair and Mr. Justice Pinhey.

1908. December 1, 10.

NYNAPPA SERVAI AND OTHERS (DEFENDANTS NOS. 1 TO 5 AND 7), APPELLANTS,

v.

VEERAN AND OTHERS (PLAINTIFFS NOS. 1 TO 13, DEFENDANTS NOS. 10 AND 11 AND SIXTH DEFENDANT'S REPRESENTATIVE), RESPONDENTS.*

Landlord and tenant—Right of melvaramdar to distribute water—The right of the ryot to the customary supply of water is proprietary.

As between the melvaramdar and the owner of the kudivaram, the right of the latter to the customary supply enjoyed by him is proprietary and not contractual. The former cannot by any agreement with third parties derogate from such right and the kudivaramdar can sue such third parties for an infringement of his right.

The right of such kudivaramdar is different from that of an ordinary Government ryot. The Crown has, unlike the melvaramdar, the right to revise the assessment and to distribute water in the interests of the general public, subject to the claim of the ryot for a supply sufficient for his requirements.

SECOND APPEAL against the decree of S. Ramasawmi Ayyangar, Subordinate Judge of Madura (East), in Appeal Suit No. 70 of 1905, presented against the decree of S. Raghava Ayyangar, District Munsif of Sivaganga, in Original Suit No. 317 of 1903.

* Second Appeal No. 290 of 1906.

The plaintiffs were the kudivaramdars of village M. of which the tenth defendant was the melvaramdar. The lands in M. have from time immemorial been irrigated by a certain tank to the exclusive use of which the plaintiffs had acquired a prescriptive right. The defendants Nos. 1 to 5 had by agreement with tenth defendant converted some lands in village N. into wet lands and dug a channel from the tank, by which they irrigated the said lands in N.

The plaintiffs sued for a permanent injunction to restrain such use by defendants Nos. 1 to 5; to compel them to fill the channel and for other reliefs.

The District Munsif passed a decree for plaintiffs granting the reliefs claimed.

The decree was confirmed in appeal.

Defendants Nos. 1 to 5 and 7 appealed to the High Court.

S. Srinivasa Ayyangar for appellants.

S. Gopalasawmi Ayyangar for first to tenth respondents.

JUDGMENT.—The plaintiffs represent the kudivara mdars of the village of Maruppanandal of which the tenth defendant as the trustee of Tirukkalakudi devastanam is the melvaramdar. The lower Courts have held that the defendants Nos. 1 to 7 and the tenth defendant are not entitled to irrigate certain lands in the Nettandal village with the water of the tank in the plaintiffs' village.

It is found that the lands of the plaintiffs have been cultivated as wet lands from time immemorial; that the water in the tank is hardly sufficient to irrigate them and the supply of this tank water for the irrigation of other lands must therefore necessarily cause damage to the plaintiffs. It is also found that the lands held by the defendants Nos. 1 to 7 in the Nettendal village, which under an agreement with the tenth defendant, they are attempting to irrigate with this tank water, are new lands which were not hitherto supplied with water from this tank.

It is now argued on behalf of the defendants Nos. 1 to 7, the appellants before us, that the relation between the plaintiffs and the tenth defendant is only contractual, and therefore the plaintiffs' remedy, if any, is only against him, and the decision in *Chinnappa Mudaliar* v. *Sikka Naikan*(1) is relied upon in support of this contention. That ruling has reference to the liability of the Crown

(1) (1901) I.L.R., 24 Mad., 86.

to supply water to a ryot. It dissents from an earlier ruling in *Ramachandra* v. *Narayanasami*(1) and is dissented from in a later decision by Subrahmania Ayyar, J., in *Sankaravadivelu Pillai* v. *Secretary of State for India*(2).

As between the Crown and the ryot different considerations may arise. The Crown claims the right of periodical revisions of assessment and the right to distribute the water for the benefit of the public subject only to the ryots' claim for such supply as is sufficient for his requirements and, for that purpose, to make the necessary alterations in the sources of such supply. The melvaramdar has neither the right of such revision of assessment nor was under any obligation to any other than the ryots of the plaint village for the distribution of this tank water.

Whatever might be the case therefore as between the Crown and the ryot, the right of the plaintiffs' kudivaramdars to the customary supply of water from the tank is a proprietary right appurtenant to their ownership of the lands.

In this view of the case we dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sankaran-Nair.

VENKATAKRISHNAMA CHARLU (DEFENDANT), APPELLANT,

v.

KRISHNA RAO (PLAINTIFF), RESPONDENT.*

1909. January 21, 22.

Civil Procedure Code—Act XIV of 1882, *s.* 244—*Jurisdiction of Court to entertain separate suit in respect of matters falling within s.* 244—*Time for objecting to the maintainability of such suit.*

Where matter which ought to be decided in execution under section 244 of the Code of Civil Procedure is tried in a separate suit by the Court executing the decree, such Court does not act without jurisdiction, as the section does not affect the jurisdiction of the Court but only prescribes the form of procedure.

Purmessuree Pershad Narain Singh v. *Jankee Koer* (1873) (19 W.R., 90). *Pasupathy Iyer* v. *Kothanda Rama Iyer*, [(1905) (I.L.R., 28 Mad. 64)], referred to.

The objection should be taken in the original Court.

(1) (1893) I.L.R., 16 Mad., 333. (2) (1905) I.L.R., 28 Mad., 72 at p. 81.

* Second Appeal No. 435 of 1906.

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SECOND APPEAL against the decree of A. T. Forbes, District Judge of Bellary in Appeal Suit No. 32 of 1904, presented against the decree of V. G. Narayana Ayyar, District Munsif of Bellary, in Original Suit No. 290 of 1902.

The present plaintiff brought a suit against the defendant and his two brothers *G.* and *K.* to recover money due from them.

The defendant and *K.* were exonerated with costs and a decree was passed against *G* alone. In execution of the decree, a printing press was attached. The defendant intervened with a claim petition under section 278 of the Code of Civil Procedure and the attachment was raised. The plaintiff filed this suit against the defendant for a declaration that the press was liable to be attached in execution of the decree against *G*. The Munsif held that the press belonged to defendant and dismissed the suit. An appeal was preferred by plaintiff. After the appeal was heard on the merits, the defendant for the first time raised the plea that the suit was in contravention of section 244 of the Code of Civil Procedure. The District Court disallowed the plea and, on the merits, decided in favor of the plaintiff.

The defendant appealed.

L. A. Govindaraghava Ayyar for appellant.

The respondent not appearing in person or by vakil.

JUDGMENT.—This suit is brought to declare the plaintiff's right to attach certain property in execution of the decree in Original Suit No. 479 of 1899 which he obtained against one Gopalacharlu. The defendant also was a party to that suit. The Judge has therefore held that the question is one that should have been determined in execution and not by separate suit. But as the Court which tried this original suit is also the Court for executing the decree, he held that the Court has not acted without jurisdiction and disallowed the contention of the appellant that the suit must be dismissed on the ground that it is barred by section 244 of the Civil Procedure Code of 1882.

The same contention is raised before us. In the earliest reported case, brought to our notice which has been subsequently followed in delivering the judgment of the Court, Couch, C.J., said:—"With regard to the objection that this ought not "to be by a separate suit, but by a proceeding in execution "of the decree, the answer appears to us to be that the objection "ought to have been taken in the Court of the Subordinate Judge,

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"where it appears by the written statement it was not "taken.

"Section 11, Act XXIII of 1861, no doubt, provides that "questions arising between the parties to the suit in which the "decree was passed and relating to the execution of the decree, "shall be determined by order of the Court executing the decree, "and not by separate suit. But that, we consider, does not "affect the jurisdiction of the Court, but only the form of "procedure. Here, a separate suit has been brought in the same "Court as would have had the execution of the decree. There "was a wrong form of proceeding, but there was not, in our "opinion, a want of jurisdiction which can be made a ground of "objection in the present stage of the suit. Whatever language "may have been used by the learned Judges in the case Mr. "Allan quoted must be considered with reference to the case "before them, which was one where the party was suing in the "wrong Court, in the Civil Court, when he ought to have sued in "the Revenue Court. Here, the Subordinate Judge decided that "the question between the parties could not be entertained in "executing the decree, but must be tried by a separate suit. "Supposing in that he decided wrongly, we consider that it is not, "as we have said, a question of want of jurisdiction. The "plaintiff has been led by that decision to bring the present "suit. She has acted perfectly *bonâ fide*, having been misled by "the decision of the Judge." *Purmessuree Pershad Narain Singh* v. *Jankee Koer*(1). This was followed in *Azizuddin Hossein* v. *Ramanugra Roy*(2) where it was similarly pointed out there is no exercise of jurisdiction by the munsif which he did not possess in determining the question in a separate suit if any application under section 244 to determine such question also would have been inquired into by him. It was also held where the point was not raised by the pleadings, the High Court should not allow it to be raised before that Court. This was followed in *Biru Mahata* v. *Shyama Churn Khawas*(3). In that case the plaintiff had failed to get any relief in execution proceedings under section 244. The High Courts of Allahabad and Madras took the same view in *Jhamman Lal* v. *Kewal Ram*(4), *Mayan*

(1) (1873) 19 W.R., 90.
(2) (1887) I.L.R., 14 Calc., 605 at p. 608
(3) (1895) I.L.R., 22 Calc., 483, 485.
(4) (1900) I.L.R., 22 All., 121.

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Pathuti v. *Pakuran*(1) and *Pasupathy Ayyar* v. *Kothanda Rama Ayyar*(2).

It was contended by Mr. Govinda Raghava Ayyar that the suit brought by the respondent cannot be treated as a proceeding under section 244, as there was already an application under that section on which an order was passed against him. But there were similar applications and orders in *Pasupathy Ayyar* v. *Kothanda Rama Ayyar*(3), *Biru Mahata* v. *Shyama Churn Khawas*(4) and in the case of *Purmessuree Pershad Narain Singh* v. *Jankee Kooer*(5). It must also be noticed that the reason of the rule is, as pointed out by Couch, C.J., that the question is only one of procedure and does not affect the jurisdiction of the Court. We therefore disallow this contention.

It has also to be pointed out that this question was not raised before the munsif nor before the Judge till he had written his judgment on the other questions raised in the case; and according to the decisions in *Purmessuree Pershad Narain Singh* v. *Jankee Kooer*(5) and *Azizuddin Hossein* v. *Ramanugra Roy*(6) the appellant ought not to have been allowed to raise this question at that stage.

We dismiss the second appeal.

(1) (1899) I.L.R., 22 Mad., 347.
(2) (1905) I.L.R., 28 Mad., 64.
(3) (1905) I.L.R., 28 Mad., 64.
(4) (1895) I.L.R., 22 Calc., 483, 485.
(5) (1873) 19 W.R., 90.
(6) (1887) I.L.R., 14 Calc., 605 at p. 608.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

1908. September 29, 30. October 1. November 16. December 14 to 18. 1909. March 9.

SREEMAN MAHA MANDALESWARA KATARI SALVA MAHARAJA UMADE RAJAH MAHARAJA RAJE KUMARA TIRUMALRAJU BAHADUR DEVA MAHARAJULUNGARU, ZAMINDAR OF KARVETNAGAR (DECEASED) AND ANOTHER (RESPONDENT—JUDGMENT-DEBTOR AND HIS LEGAL REPRESENTATIVE), APPELLANTS IN A.A.O. No. 53 OF 1907,

v.

SREE MAHANT DOSSJI VARU, TRUSTEE OF TIRUMALAI, TIRUPATI, ETC., DEVASTANAMS (PETITIONER—DECREE-HOLDER), RESPONDENT IN A.A.O. No. 53 OF 1907.*

Hindu Law—Impartible estate, succession to—Liability of son for debts of father—Civil Procedure Code, Act XIV of 1882, *s.* 234—*Impartible estate does not pass by survivorship but as separate property and constitute assets within the meaning of s.* 234, *Civil Procedure Code—Custom of non-alienability cannot be set up in execution proceedings—Mortgage decree not impeachable in execution proceedings—Attachment, effect of—Does not create a charge.*

A decree against a father can, when the father dies before the decree is fully executed, be executed against the son as representative by attaching any separate property of the father inherited by the son. The joint family property in the hands of the son cannot however be so attached and sold. The owner for the time being of an impartible estate is the exclusive owner of such estate, subject to any custom restricting his powers of alienation and no other member of the family has any joint interest in it. Such estate devolves on the son not by survivorship as joint propery but as the separate property of the father.

Where such property devolves on a son from his father and the son as representative is proceeded against under section 234, Civil Procedure Code of 1882, in execution of decrees obtained against his father, the inherited estate will be assets for the purposes of section 234 of the Civil Procedure Code of 1882.

Nachiappa Chettiar v. *Chinnayasami Naicker*, [(1906) I.L.R., 29 Mad., 458], not followed.

Raja of Kalahasti v. *Achigadu*, [(1907) I.L.R., 30 Mad., 454], approved.

Where an impartible estate in the hands of a son is attached in execution of decrees obtained against his father, it is not open to the son in execution to take objection on the ground that such estate is by custom inalienable. Such

* Appeal Against Order No. 53 of 1907.

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objection can only be taken by way of a separate suit. Such a custom does not necessarily imply the existence of co-parcenery rights which will make the property joint family property.

Ramasami Naik v. *Ramasami Chetti*, [(1907) I.L.R., 30 Mad., 255], referred to.

A decree for sale under the Transfer of Property Act cannot be impeached in execution proceedings but only by separate suit.

Kuriyali v. *Mayan*, [(1884) I.L.R., 7 Mad., 255], dissented from.

Attachment of property in execution does not give any title and confers on the attaching creditor no higher right than to have the property kept *in custodia legis* pending the determination of his rights.

APPEAL against the order of K. C. Manavedan Raja, District Judge of North Arcot, in Execution Petition Register No. 78 of 1905 in Original Suit No. 25 of 1896.

The petitioners were decree-holders and they sought to execute the decrees obtained by them against the late Raja of Karvetnagar. The counter-petitioner, the present Raja, was the son of the judgment-debtor. He opposed the petitions on various grounds. First, that he succeeded by right of survivorship, and that the estate was not, therefore (assets in his hands), liable for the satisfaction of the decree amount. Secondly, that the debts were not legally recoverable and that any alienations that the late Zamindar might have made were not binding on him or on the estate to which he had succeeded. He also set up a special custom by which it was said the Estate of Karvetnagar was inalienable except for purposes for which the manager of a joint Hindu family might alienate as such manager of joint family property.

The remaining facts are sufficiently set out in the judgment.

The Hon. Mr. *V. Krishnaswami Ayyar* and *L. A. Govindaraghava Ayyar* for appellants.

P. R. Sundara Ayyar and *S. Gopalaswami Ayyangar* for respondent.

JUDGMENT.—These are appeals against orders made by the District Judge of North Arcot on execution petitions presented by creditors of the late Raja of Karvetnagar against his son, the present Raja.

The decrees were obtained against the late Raja and the petitioners sought to execute them against the present Raja as the legal representative of his father.

The decrees may be classified under three heads:—

(1) Mortgage decrees.

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(2) Decrees in execution of which properties have already been attached.

(3) Decrees which creditors are now seeking to execute for the first time.

As regards classes 1 and 2 the Judge overruled the objections of the present Raja and allowed execution to proceed. As regards class 3 he dismissed the applications for attachment, but returned the applications with leave to re-present them with an express statement that the property which the petitioners sought to take in execution was the separate property of the deceased Raja.

The present Raja relies on an alleged custom that the estate of Karvetnagar is inalienable except for purposes for which the manager of a joint Hindu family can as such manager alienate joint family property (see the order of the Judge, paragraph 1). The appeal was argued so far as the alleged custom was concerned by way of demurrer, *i.e.*, the alleged custom was assumed to exist. If, therefore, our decision on the questions of law which have been raised is in favour of the present Raja on the strength of the custom, the case will have to go back for a finding with reference to the alleged custom. We deal with the questions of law on the assumption that the tenure of the estate is governed by the alleged custom of inalienability qualified as stated.

It is obvious that whilst special questions of law arise in connection with the mortgage decrees and the decrees in execution of which properties were attached during the life-time of the late Raja, the questions of law which have to be considered in connection with decrees in which attachment is now sought for for the first time have also to be considered in connection with the other two classes of cases. It therefore seems convenient to deal with the third class of cases in the first instance.

The argument on behalf of the present Raja, putting it broadly was (1) that the estate being inalienable, he took it not by inheritance but by survivorship and this being so, the interest of the late Raja came to an end on his death, and that, consequently, no property of the deceased had come to the hands of the present Raja within the meaning of section 234 of the Code of Civil Procedure; (2) that the custom over-rode the liability of the son under the Hindu Law to pay the father's debts and that, in any view, the decrees could not be enforced unless the creditors could

establish that the decrees were in respect of debts which were binding on the family, and that this could only be made out by an independent suit and could not be established in execution proceedings.

With reference to these questions we adopt the exposition of the law given by Sir Bhashyam Ayyangar in his judgment in *Periasami Mudaliar* v. *Seetharama Chettiar*(1) "If the decree was obtained against the father only and the father dies before the decree is executed or fully executed, the decree can of course be executed against the son (under section 234 of the Civil Procedure Code) in his character as 'legal representative' of the deceased judgment-debtor; and in that case only the separate or self-acquired property of the deceased father can be attached and sold as the property of the deceased which has come to the hands of the legal representative, but according to the course of decisions in this Presidency, the joint family property in the hands of the son could not be attached and sold either in whole or in part, the *ratio decidendi* of these decisions being that in executing the decree against the son on the death of the father, the question whether the debt is an illegal or immoral one cannot be raised in execution proceedings and that the decree can be executed against the son under section 234, Civil Procedure Code, only as the legal representative of his deceased father, who, equally with the father, will be bound by the decree, whatever may have been the character of the debt but who will be liable to satisfy the decree only to the extent of the 'assets' of the deceased father, *i.e.*, his separate or self-acquired property, which have come to his hands."

It is settled law that for purposes of succession an impartible estate descends as if the estate of the father was joint and not separate. See *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing*(2), where it was held by the Privy Council that for determining who is to be heir to an impartible estate the same rules apply which govern the succession to partible estates though the estate can be held by only one member of the family at a time. The question for our consideration is 'Was the interest of the late Raja joint with his son in the sense that, on his death, it survived to the son.'

(1) (1904) I.L.R., 27 Mad., 243 at p. 248. (2) (1891) I.L.R., 18 Calc., 151.

Prior to the decision of the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari*(1), the law applied in connection with the succession to an ancestral impartible estate was that applicable to ordinary joint family property. (See *Sri Rajah Yenumula Gavuridevamma Garu* v. *Sri Rajah Yenumula Ramandora Garu*(2).) The law, however, was altered by the decision of the Privy Council in the Allahabad case. The effect of the decision may be thus stated. In the case of an impartible estate there is no such co-parcenary right as, under the Mitakshara law which governs the descent of ordinary property, attaches to a son on his birth. The right to partition is so connected with the right by birth that if there is no right to partition there is no right by birth. During the life-time of the holder of the estate for the time being the son has no present interest in the estate, and the son's right to restrain alienation being an incident of his right by birth, as there is no right by birth, there is no right to restrain. It was contended that the logical result of this decision is that the holder is the exclusive owner of the estate and has full disposing power over it, and that parties who would be entitled to share if the estate were partible have no rights beyond such rights to maintenance as they may have under the Hindu Law, and that as regards questions of liability for debts an impartible estate is not governed by the law applicable to ordinary joint family property. In *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards*(3) it was held that the right of alienation which was recognized in *Sartaj Kuari* v. *Deoraj Kuari*(1) might be exercised by will. The principle that the right to take by survivorship depends on the right to partition was reaffirmed by the Privy Council in *Venkayyamma Garu* v. *Venkata Ramanayyamma Bahadur Garu*(4). These decisions would seem to establish that apart from any custom the holder of an impartible estate for the time being has complete dominion over it subject to the rights of maintenance in other members of the family. If, during the life-time of the holder, no other member of the family has any present proprietary interest in the estate it follows that there is nothing to survive on the death of the holder and the estate descends as if it were separate estate, subject to the special

(1) (1888) I.L.R., 10 All., 272. (2) (1870) 6 M.H.C.R., 93.
(3) (1899) I.L.R., 22 Mad., 383. (4) (1902) I.L.R., 25 Mad., 678.

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rule of law that for the purpose of ascertaining the party on whom the estate devolves the property is to be regarded not as separate estate but as joint family property.

Apart therefore from any question of custom it seems to us that it follows from the decisions to which we have referred that the property of the deceased Raja must be regarded as assets in the hands of his legal representative for the purpose of section 234 of the Code of 1882. The two Madras cases on which the Judge relied *Zemindar of Sivagiri* v. *Alwar Ayyangar*(1) and *Arunachala* v. *Zemindar of Sivagiri* and *Zemindar of Sivagiri* v. *Arunachala*(2) were both prior to the decision of the Privy Council in *Sartaj Kuari* v. *Deoraj Kuari*(3). In judgments of the Privy Council subsequent to the decision in *Sartaj Kuari* v. *Deoraj Kuari*(3) expressions are no doubt to be found which, taken alone, may be said to indicate that the successor to an impartible estate takes by survivorship. In *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing*(4) the question for determination was whether under the Mitakshara law, among Sudras, an illegitimate son was entitled to succeed to an impartible Zemindari on the death of his legitimate brother and the Privy Council observed that the illegitimate brother was entitled to succeed by survivorship. No question then arose as to the nature of the estate taken by the holder for the time being or as to whether co-parcenary subsisted between the two brothers, the only question being whether illegitimacy was a bar to succeeding to the estate. The judgment of the Privy Council was delivered by the same learned Judge, Sir R. Couch, who delivered the judgment in *Sartaj Kuari* v. *Deoraj Kuari*(3) and contains no reference to the earlier case. We do not think there is any real conflict between the decisions. In *Immudipattam Thirugnana Kondama Naik* v. *Periya Dorasami*(5) the estate in question was described by the Privy Council in general terms as " a joint estate though impartible " (see page 385) but the question we have to consider was not before their Lordships. Further it is settled law that, for purposes of tracing the line of descent, the interest of the son is regarded as joint and not separate. As Miller, J., points out in his judgment in *Raja*

(1) (1881) I.L.R., 3 Mad., 42.
(2) (1884) I.L.R., 7 Mad., 328.
(3) (1888) I.L.R., 10 All., 272.
(4) (1891) I.L.R., 18 Calc., 151.
(5) (1901) I.L.R., 24 Mad., 377.

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of Kalahasti v. *Achigadu*(1), " In *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing*(2) a case decided after the case of *Sartaj Kuari* v. *Deoraj Kuari*(3), mother and guardian of Lal Narindar Bahadur Pal, but before the Pittapur case (*Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur* v. *The Court of Wards*(4)) their Lordships of the Privy Council held that the succession in that case was ' by virtue of survivorship,' but in an earlier part of the judgment they explain that ' in considering who is to succeed on the death of the Raja, the rules which govern the succession to a partible estate are to looked at '; that is to say, as we understand it, the Raja's successor is to be chosen from among those who ' but for the impartibility of the estate would have been co-parceners with him ' (*Stree Rajah Yanumula Venkayamah* v. *Stree Rajah Yanumula Boochia Vancondora*(5)). And in the Pittapur case, their Lordships point out that the language used in *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing*(2) was intended to apply only to the succession to the estate."

In the *Udayarpalayam Case*(6) Lord Macnaghten in delivering the judgment of the Privy Council uses the expression. " When impartible property passes by survivorship;" but here as in *Jogendro Bhupati Hurrochundra Mahapatra* v. *Nityanand Man Sing*(2) their Lordships were not dealing with the question whether co-parcenary subsisted between the party from whom, and the party to whom, the estate passed. Moreover Lord Macnaghten adopts the expression from the decision in *Naraganti Achamma Garu* v. *Venkatachalapati Nayanivaru*, *Venkatachalapati Nayanivaru* v. *Gopal Nayanivaru* and *Chellamma Garu* v. *Gopal Nayonivaru*(7) a case decided before the decision in *Sartaj Kuari* v. *Deoraj Kuari*(3). In *Abdul Aziz Khan* v. *Appayasami Naicker*(8) the Privy Council clearly recognizes the principle that an impartible estate does not pass by survivorship. In the Indian High Courts there is a direct conflict of authority upon the question under consideration. In Calcutta it was held in *Kali Krishna Sarkar* v. *Raghunath Deb*(9) following one earlier decision and

(1) (1907) I.L.R., 30 Mad., 454.
(2) (1891) I.L.R., 18 Calc., 151.
(3) 1888) I.L.R., 10 All., 272.
(4) (1899) I.L.R., 22 Mad., 383.
(5) (1870) 13 M.I.A., 340.
(6) (1905) I.L.R., 28 Mad., 508.
(7) (1882) I.L.R., 4 Mad., 250.
(8) (1904) I.L.R., 27 Mad., 131.
(9) (1904) I L.R., 31 Calc., 224 at p. 227.

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dissenting from another earlier decision of that Court that the interest which a deceased member of a Mitakshara family had in an impartible Raj as proprietor, was not assets in the hands of his successor; and proceedings under section 234 of the Code of Civil Procedure could not be taken against the latter as representative of the deceased. With reference to this case it is to be observed that it was conceded that the respondent had succeeded to the estate by virtue of the law of survivorship (see page 227). In the case before us it is contended that the present Raja has not succeeded because rights of survivorship have accrued to him, although it is not disputed that the line of descent is to be traced as if the property had been ordinary ancestral family property. Further, the passages from the judgments of the Privy Council on which the Calcutta Court relied were all passages dealing with the question of the rule of succession with reference to the party entitled to succeed not with the question of the nature of the estate which devolved upon the party entitled to succeed.

In this High Court there is direct conflict between the view taken in *Nachiappa Chettiar* v. *Chinnayasami Naicker*(1) and that taken in *Raja of Kalahasti* v. *Achigadu*(2). In the former case it was held by Sankaran-Nair, J., that an undivided member who succeeds to ancestral impartible property to the exclusion of nearer heirs of the last holder, does so only by right of survivorship (*Katama Natchiar* v. *The Raja of Shivagunga*(3)) and not simply as a member of the family of which he and the last holder were undivided members. In *Raja of Kalahasti* v. *Achigadu*(2) it was held that the successor to an impartible estate is not a co-owner with his predecessor in the moneys due to the latter before his death. He derives his title to such debts only at the death of his predecessor, as part of such predecessor's effects and cannot recover them without obtaining a certificate under Act VII of 1889, that the rule of succession in impartible estates was based on a theoretical co-parcenary and not on any actual unity of interest between the predecessor and his successor, and that this theoretical community of interest could be applied only for the purpose of determining the succession and for no other purpose whatsoever.

(1) (1906) I.L.R., 29 Mad., 453. (2) (1907) I.L.R., 30 Mad., 454.
(3) (1834) 9 M.I.A., 543 at pp. 611, 614.

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It is not necessary for us to discuss these decisions at length. We content ourselves with saying that we agree with the conclusions arrived at by the learned Judges in *Raja of Kalahasti* v. *Achigadu*(1) and with the reasoning upon which the conclusion is based.

The view taken in *Raja of Kalahasti* v. *Achigadu*(1) is in accordance with that taken in *Ramasami Naik* v. *Ramasami Chetty*(2), where it was contended that in the case of an impartible zamindari there was a dormant co-ownership in all the male members of the family in conjunction with the holder of the estate for the time being, but the Court in accordance with the decision in *Sarta Kuari* v. *Deoraj Kuari*(3) declined to accede to the contention. In *Veera Soorappa Nayani* v. *Errappa Naidu*(4) the same view was taken.

Sartaj Kuari v. *Deoraj Kuari*(3) decided that if there the son had no right to partition he had no proprietary right at birth. If he had no proprietary right at birth it seems to us to follow that the whole estate is in the holder for the time being. If the whole estate is in the holder for the time being, there is nothing to survive on his death, and we can find nothing in the judgments of the Privy Council since *Sartaj Kuari* v. *Deoraj Kuari*(3) as we read them, which is in real conflict with this proposition.

We have considered the case, so far, apart from the alleged custom. The question remains, assuming the custom to be proved, is the zamindari in the hands of the son assets which can be proceeded against in execution in satisfaction of the judgment debt against the father. It seems to us the answer to this question depends on whether the custom relied on is a custom under which co-parcenary subsisted between the father and the son. If it did, the property in the hands of the son cannot be taken in execution. If it did not, it can. Now the custom alleged is not that the property of the late Raja is not liable for his debts and is not a custom under which there is co-ownership or dormant co-ownership in the members of the family with the holder of the estate for the time being. It is a custom under which the dominion of the holder for the time being as regards alienation is a restricted

(1) (1907) I.L.R., 30 Mad., 454. (2) (1907) I.L.R., 30 Mad., 255.
(3) (1888) I.L.R., 10 All., 272. (4) (1906) I.L.R., 29 Mad., 484.

dominion limited to the cases in which the manager of a joint Hindu family can, as manager, alienate joint family property. The Hindu conception of ownership as consisting in exclusive use does not necessarily include a right of alienation. See West and Buhler, page 318. Unless the custom involves co-parcenary, and in our view it does not, the custom as it seems to us makes no difference with regard to the question we have to decide. In *Ramasami Naick* v. *Ramaswamy Chetti*(1), where the special custom was proved, the Judges observed "Here the special custom has been proved, but the fact that the Zamindar is restrained by special custom from alienating beyond his own life-time does not in our opinion prove that the other members of the family are dormant co-owners with him of the zamindari; and this is not the effect of the decision in *Siva Subramania Naicker* v. *Krishnamma*l(2)."

Further, in our opinion, it is not open to the son to set up the alleged custom in execution proceedings. If he wishes to establish a custom or to challenge a transaction as having been in contravention of the custom he must do so by way of a separate suit in the same way as if he were seeking to establish that the debt on which the decree had been obtained was illegal or immoral.

With regard to the other two classes of cases, the reason on which the conclusion we have come to with regard to the first class of cases is based, are generally speaking applicable. Special questions of law, however, arise in connection with the other two classes of cases.

With regard to the mortgage decrees the Judge held that the judgment-creditors were entitled to proceed by way of execution. As regards these decrees the question is not to be determined with reference to the extent or character of the Rajah's liability under section 234 of the Code of Civil Procedure. The decrees themselves direct the sale of the property and in our opinion it is not open to the present Rajah to impeach the validity of the decrees in execution proceedings. We have already expressed the opinion that the custom set up does not involve the existence of a co-parcenary. In this view what the decree directs to be sold is the interest of the late Raja as full owner. Even if the custom does involve the existence of a co-parcenary what the decree directs to

(1) (1907) I.L.R., 30 Mad., 255 to 261.
(2) (1895) I.L.R., 18 Mad., 287 at p. 291.

be sold is the interest which the late Rajah, as managing member, had power to deal with. The question whether a given transaction was beyond his power would be a matter to be determined by a separate suit.

The distinction between a mortgage decree and a money decree has been frequently pointed out. In *Baboo Hurdey Narain Sahu* v. *Pundit Baboo Rooder Perkash Misser*(1) the decree was a money decree, and the Privy Council in giving judgment in that case observes that that case was distinguishable from the cases where the father, being a member of a joint family governed by the Mitakshara law, had mortgaged the family property to secure a debt and a decree had been obtained upon the mortgage and for realization of the debt by means of the sale of the morgaged property.

There is abundance of authority to support the proposition that a decree in a mortgage suit directing sale cannot be impeached in execution proceedings. We may refer to the decision of this Court in *Kumaretta Servaigaran* v. *Sabapathy Chettiar*(2) and *Tallapragada Sundarappa* v. *Boorugapalli Sreeramulu*(3) and the decision of the Calcutta High Court in *Daulat Ram* v. *Mehr Chand*(4). In *Sanwal Das* v. *Bismillah Begam*(5) the law is thus laid down:—"There is an essential difference between the execution of a decree for money by the sale of the property and the execution of a decree for sale of property specified in the decree. In the first case any third person can intervene in the execution of a decree and show that the decree could not be executed against particular property, if that property was not the property of the judgment-debtor, but was the property of the person opposing. Similarly in the case of a decree for money, where the judgment-debtor dies, his representative is entitled to oppose the execution of the decree against any particular property by showing that property was not the property of the judgment-debtor and was the property of the representative, as for example, that it was his self-acquired property. That course can be taken by a stranger or a representative in execution of a decree for money for this reason, that a decree for money is not based upon any

(1) (1883) L.R., 11 I.A., 26 at p. 28.
(2) (1907) I.L.R., 30 Mad., 26.
(3) (1907) I.L.R., 30 Mad., 402.
(4) (1888) I.L.R., 15 Calc., 70.
(5) (1897) I.L.R., 19 All., 480.

adjudication that the particular property, or in fact any property, which may subsequently be brought to sale in execution of the decree, was the property of the judgment-debtor, or property which would be liable to his debts. Consequently, when such objection is taken before the Court executing a decree for money, that Court has power to inquire into and decide on any such objection taken to the execution of the decree against any particular property. Where, however, the decree is a decree for sale under the Transfer of Property Act, the Court executing the decree must sell the property decreed to be sold and leave any one objecting to the execution of the decree against that particular property to such remedy as he may have by a suit or by resistance to the possession of the purchaser." The judgment in *Liladhar* v. *Chaturbhuj*(1) is a decision to the same effect. The case of *Kuriyali* v. *Mayan*(2), no doubt supports the contention that the rights of the judgment-creditors who have obtained mortgage decrees can be determined in execution proceedings, but as Mr. Sundara Iyer pointed out in that case the Court would seem to have overlooked the fact that the decree itself contained a direction for sale and that notwithstanding the decree for sale the properties had been attached as if the proceedings had been in execution of a money decree. Apparently all the cases in which *Kuriyali* v. *Mayan*(2) is cited with approval are cases in which the decree sought to be executed was a simple money decree or, at any rate, was not a mortgage decree and the question we have to determine did not arise. See *Mungeshur Kuar* v. *Jamoona Prashad*(3) and *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*(4).

In *Narayan* v. *Ramrao*(5) which was relied on on behalf of the present Raja, the question we have to determine does not appear to have been raised and the same observation would seem to apply to *Sivarama Sastrial* v. *Somasundara Mudali*(6). *Chander Pershad* v. *Sham Koer*(7) no doubt supports the contention put forward on behalf of the present Raja, but we think the balance of authority is against the view taken in that case. As pointed out by the Judge in *Kumaretta Servaigaran* v. *Sabapathy*

(1) (1899) I.L.R., 21 All., 277.
(2) (1884) I.L.R., 7 Mad., 255.
(3) (1889) I.L.R., 16 Calc., 603.
(4) (1892) I.L.R., 19 Calc., 683.
(5) (1901) 3 Bom. L.R., 482.
(6) (1905) I.L.R., 28 Mad., 119.
(7) (1906) I.L.R., 33 Calc., 676.

Chettiar(1), this Court doubted the soundness of the decision in *Kuriyali* v. *Mayan*(2) on the point in question. Both on principle and on authority we think, with all respect that the decision in *Kuriyali* v. *Mayan*(2) was wrong. With reference to the question of the right to impeach the decrees of this description in execution proceedings, we think that in principle no distinction can be drawn between a case where the decree has been obtained against the mortgagor and where it has been obtained against his legal representative or his heir.

As regards this class of cases we agree with the decision of the Judge.

As regards the third class of cases, *i.e.*, where there had been an attachment during the life-time of the late Raja, the question is only one of practical importance in so far as the present cases are concerned in the view that the conclusion at which we have arrived with reference to the first class of cases is wrong. If the estate of the late Raja is assets in the hands of the present Raja for the payment of judgment debts obtained against the former, the present Raja has of course no occasion to rely on the prior attachments.

The argument on behalf of the present Raja was that attachment is only a forbidding of alienation and creates no interest in the property attached which would prevail against a party taking by survivorship or by inheritance. On behalf of the judgment-creditors the argument was that the attachment had the same legal effect as a mortgage would have had and created a lien over the attached property in favour of the attaching creditor, and that if the present Raja desired to test the binding character of the debts in respect of which judgments were obtained and orders of attachment where made, he must do so by separate suit.

In *Krishna Rau* v. *Lakshmana Shanbhogue*(3) and *Lakshmana Aiyar* v. *Sreenivasa Aiyar*(4), this Court held that the effect of the attachment was to create a charge.

In view of the decision of the Privy Council in *Moti Lal* v. *Karrabuldin*(5) that an attachment merely prevented alienation and did not give title (see also *Kristnasawmy Mudaliar* v. *Official*

(1) (1907) I.L.R., 30 Mad., 26.
(2) (1884) I.L.R., 7 Mad., 255.
(3) (1882) I.L.R., 4 Mad., 302.
(4) (1898) 8 M.L.J., 64.
(5) (1898) I.L.R., 25 Calc., 179.

WHITE, C.J., AND ABDUR RAHIM, J.

ZAMINDAR OF KARVETNAGAR v. TRUSTEE OF TIRUMALAI, TIRUPATI, ETC., DEVASTANAMS.

Assignee of Madras(1), *Frederick Peacock* v. *Madan Gopal*(2), and *Byramji* v. *Chunilal*(3)), we think the two Madras decisions to which we have referred cannot be relied on. We do not think that the attachment gives the attaching creditor any higher right than to have the property kept *in custodia legis* pending the determination of his rights. This would seem to have been the view taken in *Sankaralinga Reddy* v. *Kandasami Tevan*(4).

It seems to us that the judgment-creditors who have obtained orders of attachment are in no stronger position than the judgment-creditors who have not obtained orders of attachment but for the reasons which we have stated in dealing with the case of judgment-creditors of the latter class we think the Judge was right in deciding in favour of the judgment-creditors who fall within class 2.

The cases in which the Rajah is appellant will be dismissed with costs and the cases in which he is respondent will be allowed with costs. The cases in which the respondents do not appear will be dismissed without costs. The view expressed by the District Judge on the question of limitation in paragraph 14 of his judgment that the applications are in continuation of the old proceedings, is not contested before us on behalf of the Raja.

Our order as to costs is that Appeal No. 194 of 1907 is allowed with costs and the other appeals are dismissed with costs.

(1) (1903) I.L.R., 26 Mad., 673. (2) (1902) I.L.R., 29 Calc., 428.
(3) (1903) I.L.R., 27 Bom., 266. (4) (1907) I.L.R., 30 Mad., 413.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Sankaran-Nair.

1909. March 17 to 19. April 7.

RICHARD TAYLOR AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

SRI SRI SRI KRISHNA CHANDRA GAJAPATI NARAYANA DEO MAHARAJULU GARU, THE RAJAH OF PARLAKIMEDI, MINOR BY HIS GUARDIAN *ad litem* J. G. D. PARTRIDGE, DISTRICT COLLECTOR OF GANJAM (DEFENDANT), RESPONDENT.*

Will—Secret Trusts—Indian Trusts Act, ss. 5, 81—"Attendant circumstances" under s. 81, what are—admissibility of extrinsic circumstances to prove that legatee took as trustee or to prove resulting trust in favour of next of kin—Benamee, proof of, in case of wills governed by English Law.

On the 19th April 1892, W.T. executed a will in the following terms:—

"This is the last will and testament of William Taylor, of Parlakimedi, Ganjam, India. I give, devise and bequeath unto S. S. S. Gourachandra Gajapati Narayana Deo, Zamindar of Parlakimedi, all that I may possess at the time of my death, including my property at Kodaikanal, and shares and other property in the Commercial Land Mortgage Bank, Madras, also books, furniture and other property moveable and immoveable and I appoint the said S. S. S. Gourachandra Gajapati Narayana Deo to be my sole executor. I have no doubt he will carry out my wishes. In witness whereof I, the said William Taylor, have to this, my last will and testament, set my name this 19th day of April, one thousand eight hundred and ninety-two (1892)."

W.T. died in January 1902. Subsequent to his death, a letter written by him bearing date 28th April 1895 and addressed to the then Zamindar of Parlakimedi (the legatee under the will), and containing an endorsement that it was to be opened after the death of W.T. was found. The letter directed the legatee to convert the testator's property into money and remit the proceeds to R.T., brother of W.T.

The legatee proved the will and died in 1905, and this letter was not communicated in the lifetime of W.T.

In a suit brought by the next of kin of the testator for the administration of the estate against the son and heir of the legatee.

Held per Sir ARNOLD WHITE, C.J., and SANKARAN-NAIR, J.:

That the letter of the 28th April 1895, not having been communicated in the testator's lifetime did not operate to create a trust in favour of R.T., either under the rule of English Law or under section 5 of the Trusts Act.

The legislature in enacting the proviso to section 5 of the Indian Trusts Act did not intend to depart from the English Law and the Court will impose a trust on a legatee only when there is fraud according to English Law.

* Original Side Appeal No. 40 of 1907.

Manuel Louis Kunha v. *Jnana Coelho*, [(1908) I.L.R., 31 Mad., 187], referred to.

Per Sir ARNOLD WHITE, C.J.—The letter is not admissible to show that the testator did not intend the legatee to take the interest which the will purported to give him.

"Attendant circumstances" in section 81 of the Trusts Act means the same as surrounding circumstances and it is only when the latter can be considered for the purpose of ascertaining the intention of the testator under the English Law that evidence of an attendant circumstance can be given to show that the testator did not intend to dispose of the beneficial interest in property devised by will. Under the English Law the letter could not be looked at to show that the legatee under the will was not intended to take the beneficial interest, and the Indian Law is the same.

In re Boyes, Boyes v. *Carritt*, [(1884) 26 Ch. D. 531], distinguished.

Where the "attendant circumstances" show an intention to dispose of the beneficial interest to any one, whether he is or not the legatee named in the will, there will be no resulting trust under section 81 of the Trusts Act.

The words "I have no doubt he will carry out my wishes" do not show that it was not the intention of the testator to dispose of the beneficial interest.

In the case of wills executed by an English testator, the law of "benami" cannot be applied so as to override the provisions of the Trusts Act, the Succession Act or the English principles of equity on which these provisions are based.

Per SANKARAN-NAIR, J.—The letter may be looked at for the purpose of determining whether the legatee was only a benamidar or trustee for some other person.

It is also admissible to show that the legatee was only a trustee under section 81 of the Trust Act.

An "attendant circumstance" under section 81 of the Trusts Act, means a circumstance that accompanies or follows the transfer or bequest. The letter was intended to accompany or follow the will and may therefore be taken into consideration to discover the intentions of the testator.

The letter must be read with the words of the will that the testator had no doubt that the legatee would carry out his wishes; and the two read together clearly show that the legatee was not intended to take any beneficial interest.

ORIGINAL Side Appeal No. 40 of 1907 presented against the judgment of Boddam, J., dated the 26th day of July 1907, in the ordinary original civil jurisdiction. The facts for the purpose of this report are sufficiently set out in the judgment.

P. R. Sundaram Ayyar for appellant.

C. F. Napier for respondent.

JUDGMENT (Sir ARNOLD WHITE, C.J.)—On April 19, 1892, Mr. W. Taylor executed a will in the following terms:—

"This is the last will and testament of Mr. William Taylor, of Parlakimedi, Ganjam, India. I give, devise and

bequeath unto S. S. S. Gourachandra Gajapati Narain Deo, Zamindar of Parlakimedi, all that I may possess at the time of my death, including my property at Kodaikanal, and shares and other property in the Commercial Land Mortgage Bank, Madras, also books, furniture and other property moveable and immoveable and I appoint the said S. S. S. Gourachandra Gajapati Narain Deo to be my sole executor. I have no doubt he will carry out my wishes. In witness whereof I, the said William Taylor, have to this, my last will and testament, set my name this 19th day of April one thousand eight hundred and ninety-two (1892).

(Signed) W. TAYLOR.

Signed by the testator, and acknowledged by him to be his last will and testament, in the presence of us, at the same time at his request and in the presence of each other have subscribed our names as witnesses.

(Initialled) V. V. C."

The testator died on January 29th, 1902. After his death a letter was found addressed to the then Zamindar of Parlakimedi and containing an endorsement that it was to be opened after his death. The letter is dated April 28th, 1895, and was in the following terms:—

PARLAKIMEDI,
28th April 1895

"My dear Gajapati,

When you open this I shall be dead. We have always been great friends and I suppose you will be sorry for a few days. You know where my "will" is, I leave everything to you and I wish you to burn all my private papers and to arrange all my affairs yourself alone.

Dispose of everything in my house, books, furniture, etc., as you like. A good deal of them belongs to you.

Please get my houses in Kodaikanal sold, and also, my shares in the Commercial and Land Mortgage Bank, and any other property I may possess and remit the proceeds to Messrs. H. S. King & Co., London, for transmission to my brother Richard in California. His address is 1301, West State Street, Los. Angelas, California, America.

Good-bye, from my grave, dear Gourachandra.

(Signed) W. TAYLOR."

The Zamindar proved the will. He died on or about April 27th, 1905.

The next of kin of the testator brought a suit for the administration of the testator's estate against the son of the Zamindar as his heir and legal representative.

BODDAM, J., held that the letter of April 28th, 1895, was inadmissible in evidence, that under the will the executor took the beneficial interest in the testator's estate, and he dismissed the suit.

The questions which arise for determination in this appeal are—

(1) Is the letter admissible for the purpose of establishing a trust in favour of the testator's brother Richard?

(2) If not, is it admissible, for the purpose of establishing a resulting trust in favour of the next of kin?

(3) If it is not admissible for either purpose, does the will itself show that it was not the intention of the testator that the Zamindar should take the beneficial interest in the property?

As regards the first question the English Law is clear. It is thus laid down in Lewin on Trusts, Edition 11, page 59. "If a testator by his will devise an estate, and the devisee, so far as appears on the face of the will, is intended to take the beneficial interest, and the testator leaves a declaration of trust not duly attested, and not communicated to the devisee and assented to by him in the testator's lifetime, the devisee is the party entitled both to the legal and beneficial interest: for the estate was well devised by the will, and the informal declaration of trust is not admissible in evidence."

The law on this question was discussed by Wallis, J., and Sankaran-Nair, J., in the recent case of *Manuel Louis Kunha* v. *Jnana Coelho*(1). The rule of English Law is stated by Wallis, J., on pages 190 and 191 and by Sankaran-Nair, J., on pages 195 and 196. I think the law is there correctly stated by the learned Judges.

Section 5 of the Indian Trusts Act contains a *proviso* that the rules enacted by the section shall not apply when they would operate so as to effect a fraud. Both the learned Judges who decided *Manuel Louis Kunha* v. *Jnana Coelho*(1) were of opinion

(1) (1908) I.L.R., 31 Mad., 187.

that the object of this proviso was to import into the Indian Law of Trusts the rules of equity which were discussed in *Manuel Louis Kunha* v. *Jnana Coelho*(1). Mr. Sundara Ayyar contended that the proviso to section 5 was wider than the English rule and that the legislature intended to depart from the English rule. I see no reason for taking this view. I am of opinion that, with reference to "secret trusts" under a will, the law of India is the same as that of England and that extrinsic evidence to show a specific trust is inadmissible unless the legatee under the will has assented to the trust or led the testator to believe that he has assented to it. In the present case it is not suggested that the Zamindar was aware of the existence of the letter till after the testator's death. I am of opinion that the letter of April 28th, 1895, cannot be looked at for the purpose of establishing a trust in favour of Richard Taylor.

The next question, and it is one of greater difficulty, is, is there a resulting trust?

It is contended on behalf of the next of kin that under section 81 of the Trusts Act there is a resulting trust in favour of the next of kin, or, in the language of the Indian legislature, there is an obligation in the nature of a trust under which the legatee holds the property for the benefit of the legal representative of the owner. Here again the English Law seems to be clear. It is thus stated in Lewin on Trusts, Edition 11, page 60, "should the testator devise the estate in such language that the will passes the *legal* estate only to the devisee, and manifests an intention of not conferring the equitable, in short, *stamps the devisee with the character of the trustee*, and yet does not define the particular trusts upon which he is to hold; in this case, no paper not duly attested (except, of course, papers existing at the date of the will, and incorporated by reference) will be admissible to prove what were the trusts intended. Nor will the devisee be allowed to retain the beneficial interest himself; but while the legal estate passes to him, the equitable will, according to the date and terms of the will, result to the testator's heir-at-law or general residuary devisee." Cozens-Hardy, L. J., in his judgment *In re Maddock*, *Llewelyn* v. *Washington*(2) states the law thus:—"It is necessary to consider upon what principle the undoubted rule of the Court,

(1) (1908) I.L.R., 31 Mad., 187. (2) (1902) 2 Ch., 220.

that effect is to be given under certain circumstances to declarations in writing not properly attested, is based. It is clear that no unattested document can be admitted to probate or treated as part of the will. It is established that a devisee or legatee, who is entitled absolutely upon the terms of the will, is in no way affected by the existence of a document showing that he was not intended to enjoy beneficially, if he had no knowledge of the document until after the death of the testator. Such a memorandum may or may not influence him as a man of honour, but no legal effect can be given to it." The argument was that the legislature in enacting section 81 of the Indian Trusts Act intended to depart from the English Law and that the letter was an "attendant circumstance," and could be looked at for the purpose of deciding whether the testator intended to pass the beneficial interest in the property to the legatee.

On principle it is difficult to see why evidence which is not admissible, except in the special class of cases where a man in fraud of the testator seeks to take advantage of the Statute of Frauds, to show the intention of the testator to create a specific trust, should be admissible to show that it was not the intention of the testator that the legatee should take the interest which the testator by his will purported to give him. In my opinion it was not the intention of the legislature to depart from the established rule of English Law. I think "attendant circumstances" means circumstances in existence at the date of the execution of the will and means the same as surrounding circumstances, the phrase which is usually employed in the numerous judicial decisions on the question, and it is only when surrounding circumstances can be considered for the purpose of ascertaining the intention of the testator under the English Law that evidence of an "attendant circumstance" may be given for the purpose of showing that a testator did not intend to dispose of the beneficial interest in property which is the subject-matter of a testamentary disposition. The cases are collected in Theobald on Wills, edition 7, page 122, *et seq*—and in Ameer Ali and Woodroffe on the law of evidence, edition 4, page 560. It is not necessary to discuss them. It is, I think, clear that under the English Law the letter could not be looked at to show that the testator did not intend the legatee named in the will to take the beneficial interest, and I think the Indian Law is the same. The facts *In re Boyes*, *Boyes* v.

Carritt(1) on which Mr. Sundara Ayyar relied, decided by Kay, J., were of a special character. There the testator instructed his solicitor to prepare a will leaving all his property to solicitor, but to be disposed of according to written instructions to be given subsequently. The will was executed making the solicitor universal legatee and sole executor. No directions were given to the solicitor during the testator's lifetime. After the testator's death an unattested paper was found in which the testator stated his wish that Mrs. B. should have his property except a small some which he gave to the solicitor. The solicitor disclaimed all beneficial interest in the property except to the extent of his legacy. It was held that as the testator had not in his own lifetime communicated to the solicitor the object of the trust no valid trust in favour of Mrs. B. had been created and that the solicitor held the property as trustee for the next of kin of the testator. There may be room for doubt whether evidence of the instructions given by the testator, which were not embodied in the will as executed, was admissible. But, however this may be, Kay, J., based his judgment on the express ground of the admission by the executor and legatee. In the present case there is no admission. As I have said the facts of this case were of a very special character. The solicitor disclaimed all beneficial interest. In view of this disclaimer the Court may have—well have—thought that it would be useless to insist upon the solicitor taking the beneficial interest. The recent decision of Bigham, J., *In re Bell*(2) would also seem to have been based on the ground of admission. In his judgment Kay, J., puts the hypothetical case of an engagement to hold the property not upon the terms of any paper communicated to the legatee, or put into his hands, but of any paper that might be found after the testator's death. In such a case the learned Judge observed the legatee might be a trustee, but the trust declared by the unattested paper would not be good, and that for this purpose there was no difference whether the legatee was declared to be a trustee on the face of the will or by an engagement with the testator not appearing in the will. In the case before us there is no evidence of any "engagement with the testator." In his judgment in *In re Maddock*, *Llewelyn* v. *Washington*(3)

(1) (1884) 26 Ch.D., 531. (2) (1908) 99 L.T., 939.
(3) (1902) 2 Ch., 220.

Cozens Hardy, L.J., makes the following observation: "The so-called trust does not affect the property except by reason of a personal obligation binding the individual devisee or legatee. If he renounces, and disclaims, or dies in the lifetime of the testator, the persons claiming under the memorandum can take nothing against the heir-at-law or next of kin or residuary devisee or legatee."

I think these words are wide enough to cover the facts of *In re Boyes*(1) where the solicitor took out probate of the will but disclaimed beneficial interest as legatee. Mr. Sundara Ayyar argued that if evidence of an admission or disclaimer was admissible for the purpose of depriving the legatee of his beneficial interest evidence of any other extrinsic fact which showed that the testator did not intend that the legatee should take the beneficial interest was also admissible. He was not able to cite any authority in support of this contention and it seems to me to be contrary to the principles in which the law with reference to the admissibility of extrinsic evidence is based. Under the law prior to the passing of the Executor's Act, 1830, when the executor was entitled to the residue not disposed of, evidence on behalf of the next of kin would appear to have been only admissible to contradict evidence given in support of the executor's title. See *The Bishop of Cloyne* v. *Young*(2), cited in Theobald on Wills, Edition 7, page 136.

If I am right in my view that the letter is inadmissible as evidence of an "attendant circumstance" to show that the testator did not intend to dispose of the beneficial interest, the question of the construction of section 81 of the Indian Trusts Act does not arise. The question was argued before us, as it was argued before Wallis and Sankaran-Nair, JJ., in *Manuel Louis Kunha* v. *Jnana Coelho*(3). Sankaran-Nair, J., in effect held that the section should be construed by reading into the section the words "to the transferee or legatee" after the words "interest therein." This was no doubt *obiter*, but the learned Judge arrived at this conclusion after a very full discussion of the English and of the Indian Law. The words of section 81 of the Indian Trusts Act are "intended to dispose of the beneficial interest in the property" and it may reasonably be argued that if the "attendant circumstances"

(1) (1884) 26 Ch.D., 531. (2) (1870) 2 Ves. Sen., 91.
(3) (1908) I.L.R., 31 Mad., 187.

show an intention to dispose of the beneficial interest to A.B., there is no resulting trust in favour of the next of kin, and they cannot claim the benefit of the section. It seems paradoxical to hold that the next of kin gets the beneficial interest where the "attendant circumstance," which shows that it was not the intention of the testator that the legatee should get it, also shows that it was his intention that the next of kin, *qua* next of kin, should not get it.

If the section is to be construed as applying to *any* disposition of the beneficial interest, inasmuch as the letter shows an intention to dispose of the beneficial interest to Richard, its admission in evidence would not help the next of kin. The result would be that Richard could not take, although the testator intended him to take, because the law will not allow it, and the next of kin could not take because there was an intention to dispose of the beneficial interest to Richard. However, in the view I take as to the admissibility of the letter, I need not express any final opinion on this point.

The third question is, can it be said, having regard to the language of the will that it was not the intention of the testator to dispose of the beneficial interest in the property?

The only words in the will which can be laid hold of as indicating that the testator did not intend to pass the beneficial interest to the legatee are the words "I have no doubt he will carry out my wishes." I do not think they are enough. Mr. Sundara Ayyar relied on the decision in *Briggs* v. *Penny*(1), which would seem to be the strongest case to be found in support of his contention. The testatrix in that case gave a specific sum to her executrix, a further specific sum to her for the trouble she would have in acting as executrix, and then bequeathed her property to the executrix "well knowing that she will make a good use and dispose of it in accordance with my views and wishes." In the will before us there is no specific legacy to the executor, who was universal legatee and the words "I have no doubt he will carry out my wishes" have no express reference, as in *Briggs* v. *Penny*(1) to the testator's property. In *Stead* v. *Mellor*(2) Jessel, M.R., observed that *Briggs* v. *Penny*(1) had never been followed so far as he knew. However, I need not pause to consider whether

(1) (1851) 42 Eng. Rep., 371. (2) (1877) 5 Ch.D., 225.

the decision in *Briggs* v. *Penny*(1) is now good law since the language of the will in that case was certainly stronger for the purpose of indicating that the testator intended to create a trust, than the language of the will in the present case.

On the hearing of the appeal Mr. Sundara Ayyar applied for the admission as additional evidence of two letters which were not put in evidence before Boddam, J. The existence of the first letter was known to the plaintiffs' advisers when the case was heard by Boddam, J. The existence of the second letter was apparently not known. Mr. Sundara Ayyar asked that the letters should be admitted for the purpose of showing that the Zamindar had accepted, and acted under the trust. This case is not suggested in the plaint. I do not think that good grounds have been shown for the admission of additional evidence. Further, as it seems to me, the additional evidence, if admitted, would not help the plaintiffs. One of the letters is a letter from the Zamindar to Richard Taylor. This letter, as printed as exhibit A to the affidavit in support of the application to admit the additional evidence, is incomplete. We have looked at what is not denied to be a true copy of the letter and in it the Zamindar in effect claims to be entitled to the beneficial interest in the property. The other is a letter from Sir Henry King & Co., London, to the Collector of Ganjam enclosing statements of the late Zamindar's personal account and of his account as executor of the late William Taylor. I do not see how keeping an account as executor in respect of property of which he was universal legatee and executor is an admission of liability as trustee.

The question whether the law of benami could be relied upon for the purpose of making out that the Zamindar took the property as benamidar and must be deemed to hold it in trust for Richard Taylor was not raised in the written statement, and was not argued on the hearing of the appeal. Mr. Sankaran-Nair, J., in his judgment in *Manuel Louis Kunha* v. *Jnana Cœlho*(2) in discussing section 81 of the Succession Act observes: "If the transferee is only a benamidar then no question arises." As regards this question I do not desire to say more than necessary for the purposes of this case. In questions arising in connection with a will executed by an English testator I do not think that

(1) (1851) 42 Eng. Rep., 377.

(2) (1908) I.L.R., 31 Mad., 187.

the law of benami can be relied upon when the effect of its application would be to override the express provisions of the Trusts Act, or the Succession Act or the English rules of equity on which these provisions are based.

I think this appeal fails and must be dismissed. Speaking for myself I think there can be no question that Mr. Taylor desired that his property, with the exception of the house, books, furniture, etc., in the house, should go to his brother Richard. Mr. Taylor, however, in expressing his desire, failed to comply with the requirements of the law. There is thus no legal obligation on the present Zamindar. The nature and extent of the moral obligation which rests upon him will no doubt be duly considered by the present Zamindar and his advisers.

In the circumstances I think all the cost of the appeal may be paid out of the estate.

SANKARAN-NAIR, J.—By his will, dated the 19th April 1892, according to its terms, William Taylor gives the property absolutely to the Zamindar of Parlakimedi.

The letter of 28th April 1895 was not communicated to the Zamindar by William Taylor during his life time. The Court cannot therefore impose upon the conscience of the Zamindar a trust to carry out the wishes of the testator as declared by him in his letter. This letter does not create a trust under section 5 of the Trusts Act. It cannot be treated as a will or part of a will as it is not attested. As a non-testamentary instrument, it is of no effect as it is not registered and does not dedicate any property to any trust or place it beyond the power of William Taylor to deal with it.

Mr. Sundara Ayyar no doubt contended that the provisions of the section as to the creation of trust do not apply, as the proviso exempts cases of fraud and it would be a fraudulent act on the part of the Zamindar of Parlakimedi to take the property himself and frustrate the wishes of the testator. The term "fraud" no doubt has been used in India in a wider sense than in English Law, see *Annamalai* v. *Rangasami*(1); but I adhere to my opinion in *Manuel Louis Kunha* v. *Jnana Coelho*(2) that the Court will impose a trust on a legatee only when there is fraud according to English Law.

(1) (1883) I.L.R., 6 Mad., 365.

(2) (1908) I.L.R., 31 Mad., 187.

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The other question remains whether the letter may be used to show that the Zamindar of Parlakimedi is only a benamidar or trustee and that he took no beneficial interest in the property devised.

In the case of an ordinary transfer by mortgage which may have been registered and attested by two witnesses, it has not been doubted so far as I know that it is open to any person interested to show that the ostensible transferee is only a benamidar or trustee for another person. The case is the same in respect of any other transfer *inter vivos*. Section 92 of the Indian Evidence Act applies only to the terms of a transfer and does not preclude the admission of any evidence to show the benami character of the transaction. Otherwise benami transactions would have practically ceased to exist long ago. I cannot find any principle which would justify admission of such evidence in cases of sales, mortgages, etc., and its rejection in the case of wills. The cases of benami and trust for this purpose stand on the same footing.

Section 82 of the Indian Succession Act on which Mr. Napier laid much stress has nothing to do with the matter as it only declares as to wills the rule applicable ordinarily to every transfer.

I am therefore of opinion that this letter may be looked at for the purpose of determining the question whether the Zamindar of Parlakimedi was only a benamidar or trustee for Richard Taylor. The fact that this is the case of an English testator makes no difference.

The next question is assuming that it does not show that he was only a benamidar or trustee for Richard Taylor, can it also be admitted for showing that the Zamindar of Parlakimedi was only a trustee under section 81 of the Trusts Act.

Section 81 of the Trusts Act runs thus, so far as it is now material "where the owner of property transfers or bequeaths it and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein."

It appears clear to me that "the disposal of the beneficial interest therein" has reference to the transfer or bequest referred to in the earlier part of the section, or in other words, if it is legally proved that the transferor or testator did not intend *by such transfer or bequest* to part with the beneficial interest the

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transferee or legatee is a trustee for the transferor or his legal representative and cannot claim the property under such transfer or bequest.

It was further argued that this intention cannot be proved as it is not an "attendant circumstance" under section 81 of the Trusts Act. An "attendant circumstance" in this section, I conceive, means a circumstance that accompanies or follows the transfer or bequest. It appears to me that this letter in question was intended to accompany or follow the will and therefore may be taken into consideration to discover the intentions of the testator.

The legal representative of the testator takes the property not because the testator intends he should take it but because, as he has shown his intention that the legatee should not take it, the law gives it to him. I have already stated my opinion that if the letter and the will give the property to Richard Taylor he would take it; otherwise the legal representatives take under section 81 of the Trusts Act. I have discussed the question fully in my judgment in *Manuel Louis Kunha* v. *Jnana Coelho*(1), and there given the reasons for the conclusions herein summarised.

I have not referred to the English cases on the subject for the following reasons. I am not aware that the doctrine of English Law that the appointment of executors is a gift to them of the personal estate has ever been applied in India. In the case of Hindus, an executor has only been treated as a manager of the property. The Trusts Act was intended to get rid of conceptions of double ownership, a "legal" and an equitable estate. Further a benami transfer by A to B for the benefit of C was not in the contemplation of English lawyers. The English Law therefore may be referred to explain the Anglo-Indian Law and not for the purpose of determining whether there has been a departure from it. I have nothing to add to my review of the English cases in *Manuel Louis Kunha* v. *Jnana Coelho*(1). Mr. Napier's explanation of *In re Boyes, Boyes* v. *Carritt*(2) cannot be accepted after the recent decision of Bigham, J., *In re Bell*(3), where the trustee in bankruptcy did not admit that the bankrupt was only a trustee yet the Court upheld the trust on the admission of the bankrupt only.

(1) (1908) I.L.R., 31 Mad., 187. (2) (1884) 26 Ch.D., 531.
(3) (1908) 99 L.T., 939.

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The letter though written three years after the will must be read with the words in the will that the testator had no doubt that the Zamindar of Parlakimedi will carry out his wishes, and reading the two together, I have no doubt that according to the intention of the testator the will give no beneficial interest to the Zamindar of Parlakemidi and he was to take it for the benefit of Richard Taylor or the next of kin of the testator. It is unnecessary to decide between their claims as Richard Taylor also now claims for the benefit of all of them. I would therefore allow the appeal and declare that the defendant holds the property in his possession for the benefit of the plaintiffs. The costs must come out of the estate. I cannot in conclusion help expressing my regret that the Court of Wards has allowed the matter to come before the Court when the plaintiffs do not claim the amount deposited in Arbuthnot & Co.

The result is appeal is dismissed. Costs will be paid out of the estate.

Solicitors for the respondent—*W. O. David.*

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

1908. ember 11. 1909. uary 4, 5, 6, 26. pril 16.

LUTCHMEE DOSS AND ANOTHER (PLAINTIFFS), APPELLANTS,

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT), RESPONDENT.*

Water, right to—Madras Act VII of 1865*—Extent of right to tax free water to be implied in grants by Government—Voluntary payment, what amounts to.*

A grant by the Government of the right to collect the revenue of certain lands, will, in the absence of a contract regarding water rights, carry with it, by implication, only an undertaking on the part of Government not to refuse to the ryots holding nunja lands, the quantity of water necessary to enable them to irrigate those lands and so to pay the revenue which they had paid to the Government before the grant. In 1826 the Government granted to A by a cowle the revenues of a village T., which was irrigated by a tank. The cowle specified the lands granted and no portion of the bed of the tank was included in the grant. The ryots of T. and those of other villages were drawing water from the tank by turns in shares proportioned to the extent of their acreage. The Government

* Original Side Appeal No. 11 of 1907.

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had on certain occasions levied the cost of repairing the tank in accordance with such shares. In a suit by the grantee of T. against Government to recover moneys collected from him as water-cess under Madras Act VII of 1865:

Held, that the above arrangement regarding the distribution of water by turns and the action of Government in collecting the cost of repairs according to the shares in which the water was so drawn was merely evidence of a customary distribution of the water in the tank according to the areas served by it and was no evidence of the grant of any definite share of the water by Government. The ryots might demand that not less than their share should be sent down to their lands if required for the irrigation of those lands but the Government was not bound to supply them with more than was required for the irrigation of the land irrigated at the time of the grant. Where the quit-rent on an inam is fixed on the income derived from the cultivation of a certain extent of land in a certain manner, the inamdar is entitled to use, free of water-rate, such quantity of water as may be required for the cultivation of such extent in the mode in which such income was calculated, whether the water-rate is leviable as a tax or otherwise.

The engagement between the Inam Commissioner and inamdar amounts to an engagement by which the Government undertakes not to take more than a certain share of the income derived from the various sources taken into account in arriving at the amount of such income, as the consideration for relinquishing its reversionary right.

The Inam Commissioner having power to sell the reversionary right of Government had the power to fix the price according to the rules framed by Government and any engagement by him in that respect, not in contravention of such rules, will be binding on Government.

Where the income on which the quit-rent is calculated includes the income derivable from a second crop on a certain extent of wet land and from a single irrigated crop on a certain extent of dry land, no charge except the quit-rent, can be levied as water-cess or otherwise in respect of such extent for such cultivation.

Payment, made under threat of distress and sale, before the actual issue of the warrant of distress, will not be a voluntary payment if, on non-payment before the specified date, such warrant would be issued as a matter of course.

Narayanasawmy Reddi v. *Osuru Reddi*, [(1902), I.L.R., 25 Mad., 548] referred to.

ORIGINAL Side appeal from the decree and judgment of Boddam, J., dated the 21st day of December 1906, in the exercise of the ordinary original Civil jurisdiction of the High Court, Madras, in Civil Suit No. 12 of 1905.

The facts for the purpose of this report are sufficiently set out in the judgment.

P. R. Sundara Ayyar and *C. V. Anantakrishna Ayyar* for second appellant.

The Hon. The Advocate-General, *John Adam*, *J. C. Adam*, for respondent.

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LUTCHMEE DOSS v. SECRETARY OF STATE FOR INDIA.

JUDGMENT.—The principal question in this appeal is what is the extent of the plaintiff's right to draw water for irrigation from the Tinnanur tank?

We have no doubt that the plaintiff is not the owner of any part of or share in the bed of the tank. This question seems hardly to have been in dispute in the Court below but was argued before us, though Mr. Sundara Aiyar did not consider it necessary for his case to prove his client's ownership.

There is no doubt that the tank did not belong to the plaintiff's predecessors before the grant of the cowle, exhibit O, in 1826, and there is nothing in that cowle or in the schedule A attached thereto—a schedule which according to the cowle specifies the lands over which the right to collect the revenues is granted to suggest that the ownership of the tank was thereby conveyed to the inamdar. On the other hand the schedule rather indicates that it was not so conveyed, and there are circumstances which render any such alienation improbable. There is evidence in this case that part of the tank-bed is situated in the village of Veppampatti and if that is true—and it comes from the plaintiff's own witness—it is highly improbable that the Government would have made over the tank to the inamdar of Tinnanur. Even if that is not true it is certainly true that the tank serves not only Tinnanur but also another inam village and some Government villages, and it is unlikely that the inamdar of Tinnanur would have been made sole owner of a tank of this kind.

Mr. Sundara Aiyar contended that, however, the question of ownership of the tank-bed may be decided, his client must be held to be owner of a share in the water of the tank, or to have rights by way of easement to make use of a definite share of the water for irrigation of the lands of Tinnanur, if for no other purpose, and that inasmuch as he has not attempted to draw from the tank more than his share he is not bound to pay anything to the Government for the use of the water he has taken.

Now, the cowle, exhibit O, says nothing of water rights, and we cannot presume that the Government intended to grant to the inamdar any water rights other than those which would pass by implication with the grant of the rights over the land. What was granted was the right to collect the revenues of the village, and what passed by implication therewith so far as water rights are concerned would seem to be an undertaking not to refuse to the

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ryots holding nanjai lands, the quantity of water necessary to enable them to irrigate those lands and so to pay the revenue which they had paid to the Government before the grant.

The evidence to which we propose to refer does not prove that the ryots of Tinnanur as a body were entitled to a definite share of the water of the tank as against the Government. It shows that after the grant of 1826 (it is not clear whether the same system was in force before that time) there was an arrangement by which the different villages served by the tank drew water by turns of different duration, arranged no doubt originally with reference to the extent of land irrigated in each village: by this arrangement, Tinnanur got $5\frac{3}{4}$ shares out of $9\frac{1}{2}$, Annambattu one share and the other Government villages the remaining $2\frac{3}{4}$ shares, and upon the basis of this arrangement, the Government arranged on one occasion with the inamdar to share the cost of repairing the tank. The inamdar in the agreement made on that occasion (exhibit Q) is described as being interested to the extent of $5\frac{3}{4}$ shares out of $9\frac{1}{2}$ in the water drawn for purposes of irrigation. These shares are also referred to in the correspondence between the officers of Government on the subject of repairs (*vide* exhibits T and O), and in the pleadings in suits against the inamdar for contribution (*vide* exhibits U and OO). From exhibit U it appears that the Government styled the inamdar a co-owner of the tank, but there is no evidence that he ever held that position and he has never claimed it, though he has claimed to be the sole owner.

There is oral evidence as to the distribution of the water by turns and on the plaintiff's side the fact that the Government has not before the first of the years to which this suit relates demanded water-cess from the inamdar.

This evidence merely shows that there was a customary distribution of the water in the tank between the areas to be served by it; from exhibit U, it is clear that the Government did not rely on this distributary system as deciding the amount of contribution due from the inamdar, though they used it for that purpose in exhibit Q; in the suit in which exhibit U is the judgment they calculated their claim on the acreage irrigated. On the defendant's side, there is the very strong negative evidence of the grant. If the Government were granting a definite share of the water to the inamdar the cowle (exhibit C), would have said so. Of course, if

the plaintiff could show that the ryots were entitled to a definite share that would be enough for him but there is nothing to show that. They may be entitled to demand, that not less than 5⅞ths out of 9½ shares of the water shall be sent down to their lands if that amount is required for the irrigation of those lands, but there is no proof that the Government is bound to supply them with more than is required for the purposes of irrigation of the lands irrigated at the time of the grant. There is thus no proof of any engagement between the Government and the inamdar by which the inamdar is entitled to a definite share of the water in the tank, and that being so, the Government has a right by virtue of Madras Act VII of 1865 to levy a cess for water supplied for irrigation.

The inam granted in 1826 was enfranchised in 1871, a quit-rent being fixed at one-fourth of the average annual income, and second crop charge collected by the inamdar on an average extent of 141 acres of nanjai land and 36 acres of punjai land, was taken into account in arriving at the income. It is contended by the plaintiff that at least to this extent the inamdar is entitled to free irrigation, and on the other hand the Advocate-General urges that the water-cess levied is a tax and the Government does not by granting an inam undertake not to levy taxes on the grantee.

Assuming that the water-cess is a tax and not rather the price of a commodity, the engagement between the Inam Commissioner and the inamdar amounted to this: a certain income is derivable from taxes of different kinds including taxes for the use of water for 36 acres of dry lands and for second crop on 141 acres of wet lands. Of this income the inamdar takes three-fourths and the Government one-fourth as the value of its reversionary right.

This amounts to an engagement by which the Government undertakes not to take more than one-fourth of the income derived from the various sources taken into account, and one of these sources is the charge collected from the ryots for irrigation known as fasal jasti or tirva jasti according as it is levied on the irrigation of nanjai or punjai land. The Advocate-General has not shown us how this charge is to be distinguished from the water-cess leviable under the Act of 1865 and we do not think there is any true distinction. There was then an engagement between the

inamdar and the Inam Commissioner by which the latter undertook that the Government would content itself with one-fourth of the fasal and tirva jasti on the average area then chargeable with these payments, and it will be a breach of that engagement if on that area the Government now levies a further charge for water. The Advocate-General suggested that an engagement of this kind was beyond the powers of the Inam Commissioner. The power of the Inam Commissioner, speaking generally, was to sell to the inamdar, the reversionary right of the Government, and to fix the price in accordance with rules laid down by the Government and the Advocate-General has not shown us that these rules were transgressed in the settlement with which we are dealing. We are therefore bound to presume that they were followed.

To this extent of 141 acres of nanjai and 36 acres of punjai we think there is an engagement by which the inamdar is entitled to use the tank water for irrigation for second crop on the nanjai and for watering one crop on the punjai free of any charge that is not included in the quit-rent.

The learned Judge below allows free irrigation for 42 acres of second crop land, stated by the kurnam to be registered as such in the accounts. It does not appear when it was so registered but it is not found in exhibits G1 and G2; it is not unfair therefore in the absence of other evidence to infer that it was not so registered prior to the inam settlement, and consequently that it ought to be included in the area for which prior to that time, fasal jasti was charged, *i.e.*, in the 141 acres for which the inamdar is entitled to irrigation free of cess.

There remains the question of compulsion and upon that point we are unable to agree with the learned Judge who with great reluctance felt bound to hold that the payment by the plaintiff was voluntary. There was here a threat that if the money was not paid within a given time, it would be collected by distress and sale of the plaintiff's property. It is true that when the given date arrived it would have been necessary to issue a new distress warrant before actual seizure of the property, but the fact does not in our opinion affect the efficacy of the threat; the issue of the warrant would inevitably follow the default in payment. It is not necessary to decide whether or not the acts of the officers of the Government amounted to coercion within the meaning of

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section 15 of the Indian Contract Act: even if they fall short of that it may be open to the plaintiff to recover (*Narayanasami Reddi* v. *Osuru Reddi*(1)); and we have no doubt that here the payment was made to avoid a threatened distraint and was not voluntary.

We must in these circumstances substitute for the decree of the learned Judge a decree declaring the right of the plaintiff to irrigate free of charge over and above the extent admitted by the Government, 36 cawnies 9 visams and 14 chataks of punjai land, and a second crop on 141 cawnies 1 visam and 2 chataks of nanjai and directing the refund to him of such amount as this modification may render necessary.

As regards costs we think the plaintiff should recover his costs of the appeal and the parties should pay their own costs in the Court below.

The Government Solicitor for the respondents.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Sankaran-Nair.

1909. April 14, 15, 19, 22.

THE ADMINISTRATOR-GENERAL OF MADRAS AND AS SUCH THE ADMINISTRATOR OF THE PROPERTY AND CREDITS OF PATRICK MACFADYEN (DECEASED) (PLAINTIFF), APPELLANT,

v.

THE OFFICIAL ASSIGNEE OF MADRAS AND SUCH THE ASSIGNEE OF THE REAL AND PERSONAL ESTATE AND EFFECTS OF SIR GEORGE GOUGH ARBUTHNOT, AN INSOLVENCY DEBTOR (DEFENDANT), RESPONDENT.*

Contract Act IX of 1872, s. 253 (10), 263—Indian Insolvency Act, s. 7—Insolvency of sole surviving partner—Official Assignee takes subject to the rights and obligations of such surviving partner.

On the death of a partner, the partnership is dissolved under section 253 (10) of the Indian Contract Act and under section 263, the rights and obligations of

(1) 1903 I.L.R., 25 Mad., 548.

* Original Side Appeal No. 20 of 1908.

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the partners continue in all things necessary for the winding up of the partnership business.

It becomes therefore the duty of the surviving partner to wind up the partnership; and as between such partner and the representative of the deceased partner, the former has, by virtue of this overriding duty, the power, if necessary, for the purpose of winding up the partnership business, to continue the business, to borrow moneys or to sell the partnership assets, real or personal.

On the insolvency of the surviving partner, the interest of the insolvent in the partnership vests in Official Assignee, under section 7 of the Indian Insolvency Act, subject to the obligation of the surviving partner to wind up the partnership. The rights incidental to such obligation, i.e., the right to realise the partnership assets and do all things necessary to wind up the partnership also vest in the Official Assignee.

The right and obligation of the insolvent as surviving partner can be made available for the benefit of the firm in the insolvency proceedings under the vesting order and it is not necessary for the Official Assignee to institute a suit against the representative of the deceased partner for winding up the partnership.

ORIGINAL Side appeal from the judgment of Wallis, J., dated 24th January 1908, in the exercise of ordinary original civil jurisdiction of this Court in Civil Suit No. 90 of 1907.

The facts are stated in the judgment of the learned Judge appealed against. The material portions are as follows.

"This is a suit by the Administrator-General of Madras as administrator of Patrick Macfadyen, deceased, against the Official Assignee of Madras as assignee of the real and personal estate of Sir George Arbuthnot, an insolvent-debtor, for a declaration that the plaintiff as representative of the said Patrick Macfadyen is entitled to a half share in all the Indian assets of Arbuthnot & Co., under which style the deceased and Sir George Arbuthnot carried on business together with John Montgomery Young, who, it is agreed for the purposes of this suit, was only a salaried partner and had no share in the partnership property. The facts so far as material are that on Saturday, 20th October 1906, Patrick Macfadyen died in London, that on Monday 22nd October the surviving partners filed their petition and a vesting order was made in Madras and that on 5th March 1907 Letters of Administration Limited to the Presidencies of Madras, Bengal and Bombay as defined in Act II of 1874 were granted to the plaintiff of the property and credits of the said Patrick Macfadyen. It may also be mentioned that the insolvency petition was at first filed in the name of Patrick Macfadyen as well as the other

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two partners, but in consequence of its having been ascertained that he had died before the filing of the petition, the petition and the vesting order were amended by striking out his name and the proceedings against him were annulled so that they do not affect the present question. The defendant's plea is that the legal estate in the moveable and immoveable properties of the firm of Arbuthnot & Co. was vested in the three partners although one of them had no beneficial interest therein, and that on the death of Patrick Macfadyen the said moveables and immoveables remained vested in the surviving partners who alone had power to deal with them for the purposes of winding up the business, and that by virtue of the vesting order they became vested in the defendant for the benefit of the creditors and that the plaintiff has only a right to have the business wound up and an account taken and to receive a half share of any surplus assets, which in this case do not exist.

In India under section 263 of the Indian Contract Act after a dissolution the rights and obligations of the partners continue in all things necessary for winding up the business of the partnership. Under this section the surviving partners have, I think, the right to realise the partnership property for the purposes of meeting its liabilities. The section says nothing of the representatives of the deceased partner and I cannot see why in India any more than in England the representatives of the deceased partner should be held to have more than a claim to share in the surplus assets and this was recently held to be so by Subramaniya Aiyar, J., in the present insolvency. It is however necessary to consider the bearing of section 45, Indian Contract Act, in this question. All the High Courts except that of Calcutta are agreed that this section 'does not prevent surviving partners from suing for partnership property without joining the representatives of a deceased partner (9 Allahabad, 486; 17 Bombay, 6; 17 Madras, 108 *contra*; 18 Calcutta, 86). This ruling appears to rest on the view that section 45 embodies a rule of substantive law abolishing among joint contractors generally the *Jus accresendi* which was never applied to partners and so putting other joint contractors on the same footing as partners in this respect, and should not be read as affecting the rule by which the surviving partners are entitled to realise and distribute the partnership assets leaving it to the representatives of a deceased partner if dissatisfied to sue

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for a winding up and get a Receiver appointed to recover the partnership assets.

If then the plaintiff as representative of Patrick Macfadyen would have had no right to interfere with the surviving partners in the winding up except by the institution of a suit for winding up, it is not apparent why the subsequent insolvency of the surviving partners should give him such a right as claimed in the plaint, even if the right to wind up the partnership did not pass to the Official Assignee on the insolvency of the surviving partners.

I am however of opinion that it did so pass whether under section 7 or section 30 of the Insolvency Act. The right of a father to dispose of his sons' share in ancestral immoveable property for the payment of his debts has been held to pass under section 7 to the Official Assignee in his insolvency in 7 Bombay, 441 and this was followed in 19 Madras, 74 which again was followed in 21 Bombay, 205, the case of a joint family business. The words of section 7 are that 'all the real and personal estate of such petitioner and all debts due to him and all the future estate, right, title, interest and trust of the said petitioner in or to any personal estate or effects which such petitioner may purchase or which may revert descend be devised or bequeathed or come to him and all debts growing due to him before the Court shall have made its order in the nature of a certificate do vest in the Official Assignee.'

I am inclined to think that these words are large enough to pass the entire interest which the surviving partners have in the whole of the partnership assets to the Official Assignee. If however it should be held that as regards the share of the deceased partner in any part of the partnership property the survivors have only a power of disposal in satisfaction of the partnership debts and discharge of their own personal liability thereon, then, I am of opinion that such power of disposal which arises as incident to the contract of partnership is a power within the meaning of section 30 and passes to the Official Assignee under that section. In this connection I may observe that *In re Bourne*, 1906, 1 Ch., 113 Mr. (now Lord) Justice Farewell, the author of the Standard work on Powers, speaks of the rights of the surviving partners over the whole partnership assets as powers. If they are powers they are powers which the surviving partners could certainly execute for their own benefit, the benefit being the discharge of their personal liability for the partnership debts.

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Whichever view is taken it follows that the suit must be dismissed."

C. F. Napier for appellant.

M. A. Tirunarayana Chariar for respondent.

JUDGMENT (THE CHIEF JUSTICE).—The point raised in this case is by no means free from difficulty.

The effect of the death of Mr. Macfadyen was to dissolve the partnership, Indian Contract Act, section 253 (10). After the dissolution, the rights and obligations of the partners continued in all things necessary for winding up the bussiness of the partnership (section 263). Mr. Napier, on behalf of the appellant, did not contend that Sir George Arbuthnot as the surviving partner had not the right to realize the property of the partnership and discharge its liabilities. I may omit Mr. Young's name since it is not disputed that Sir George Arbuthnot and Mr. Macfadyen were alone interested in the partnership assets Mr. Young being what is known as "a salaried partner," Mr. Napier's argument was that this being a personal right, based on the mutual confidence between the partners (see Lindley on "Partnership," 7th edition, page 648) it did not pass to the Official Assignee, and that for the purpose of realizing the estate the only course open to the Official Assignee (there being no provision in the Indian Insolvency Act, which corresponds to section 125 of the English Bankruptcy Act, 1883) was to bring a suit against the Administrator for the winding up of the partnership.

I do not think it can be disputed that, on the death of Mr Macfadyen, it became the duty of Sir George Arbuthnot to wind up the partnership. Vaugham Williams, L.J., *In re Bourne*(1) puts the law thus—"The real truth of the matter is that, leaving out all questions of legal estate, there is, as between the surviving partner and the representatives of the deceased partner, an overriding duty to wind up the partnership assets and to do such acts as are necessary for that purpose, and if it is necessary for that winding up either to continue the business or borrow money or to sell assets, whether those assets are real or personal, the right and the duty are co-extensive."

I take it that if Sir George Arbuthnot instead of filing his insolvency petition had as surviving partner entered into a private

(1) (1906) 2 Ch., 430.

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arrangement with the firm's creditors for the purpose of winding up the business, he could have done so without bringing a suit for winding up, and that Mr. Macfadyen's representative would have been bound thereby. Does it make any difference if the business is wound up in insolvency proceedings instituted by the surviving partner. It would appear from the judgment of the House of Lords in *Lovell* v. *Beauchamp*(1) that the rule that when a receiving order is made against a firm of which one partner is a minor an adult partner has the right to insist that the partnership assets shall be applied in payment of the liabilities of the partnership, and that until these are provided for no part of them shall be received by the infant partner, can be made available for the benefit of the creditors in bankruptcy proceedings. I think the right and obligation of Sir George Arbuthnot as surviving partner can be made available for the benefit of the firm in the insolvency proceedings under the vesting order made against the firm. In Seton on Judgments and Orders, vol. III, page 2190, the law is thus stated. Where all the surviving partners or a sole surviving partner become bankrupt, the proper *forum* for the decision of all questions relating to the estate is the Court of Bankruptcy and an action on the part of persons claiming under the deceased partner will be restrained by injunction; *secus*, where the survivors or any of them remain solvent: *ex parte* Gorden, *Morley* v. *White*(2). Lord Lindley says, "If there is only one partner living in this country his co-partners being either dead or abroad, and he becomes bankrupt, the trustee in that case winds up the affairs of the partnership as well as the private affairs of the bankrupt." Lindley on 'Partnership,' 7th edition, page 740. The estate which vested in the Official Assignee was as it seems to me Sir George Arbuthnot's interests in the partnership assets but this interest was subject to the obligation to realize the property of the partnership and to discharge its liabilities.

If Sir George Arbuthnot's right was a personal right and nothing more, Mr. Napier's argument would have been more difficult to answer. But the right was subject to the correlative obligation and it seems to me the Official Assignee took the estate subject to this obligation. Assuming Mr. Macfadyen's interest in

(1) (1894) A.C., 607. (2) (1872) L.R., 8 Ch., 214.

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the partnership assets became vested in his administrator on his death that interest was subject to the obligation on the surviving partner to sell the partnership property to pay the partnership debts. I think this obligation devolved upon the Official Assignee as an incident of the estate which vested in him under section 7 of the Insolvency Act.

I think the case (*Fraser* v. *Kershaw*(1)) on which Mr. Napier relied is distinguishable. In that case an injunction was granted to the Assignee in Bankruptcy of an insolvent partner restraining a judgment-creditor of a solvent partner who had purchased the interest of the solvent partner in partnership goods from delivering the goods to a purchaser under a sale which the judgment-creditor professed to have made.

All that that case decided was that the power of a solvent partner upon the bankruptcy of his co-partner to sell the partnership property cannot be transferred.

As it seems to me the decision might well have proceeded on the short ground that the surviving partner's right to sell is for the purpose of winding up the partnership and not for the purpose of satisfying the separate debt of the surviving partner. I think the principle of this decision does not apply when the estate of an insolvent surviving partner vests in the Official Assignee. It vests subject to the obligation which the surviving partner, as surviving partner was under, viz., an obligation to wind up the partnership business.

I do not wish to be taken to dissent from the grounds on which Wallis, J., based his judgment, but I prefer to rest my judgment on the ground which I have stated.

I think this suit was rightly dismissed by Wallis, J., and I would dismiss this appeal with costs. I certify for two counsel.

SANKARAN-NAIR, J.—I am not prepared to differ.

Attorneys for appellant—Messrs. *David & Brightwell.*

Attorneys for respondent—Messrs. *King & Josselyn.*

(1) (1856) 2 K. & J., 496.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim

SHAIK ATHAM SAHIB (PLAINTIFF), APPELLANT,

v.

DAVUD SAHIB (DEFENDANT), RESPONDENT.*

1909. April 20, 21, 22. July 28.

Foreign judgments—Jurisdiction of Court over absent foreigner—International Law—Judgment of Court against absent foreigner subject to the same sovereignty—Authority to bind absent foreigner must be conferred by express words by the supreme authority—Submission to jurisdiction of foreign Court, what amounts to.

The rule of International Law that Courts cannot, by their judgments, bind absent foreigners who have not submitted to their jurisdiction is not restricted in its application to foreign Independent States only but is also applicable where the country in which the judgment was passed and that in which it is sought to be enforced have separate and distinct systems of administration and judicature, though owning allegiance to the same sovereign. A judgment of the Ceylon Court against a native of British India who was not at, the time of the action, resident in Ceylon and had not submitted to the jurisdiction of such Court, must be treated as a nullity when sued upon in Courts in British India.

Gurdyal Singh v. *Raja of Faridkote*, [(1895) I.L.R., 22 Calc., 222], refered to.

Emanuel v. *Symon*, [(1908) 1 K.B., 302], referred to.

It may be competent to the common sovereign authority to confer jurisdiction on the Courts of one country over absent foreigners residing in the other; but such jurisdiction must be conferred by clear and unambiguous words and cannot be inferred as a matter of implication.

A decree based on a contract imposing a personal obligation on an absent foreigner is not binding on him, even when the contract is made in the territory of the *forum* which passed the decree.

A person who appears in obedience to the process of the foreign Court and applies for leave to defend the action without objecting to the jurisdiction of the Court when he is not compellable by law to do either, must be held to have voluntarily submitted to the jurisdiction of such Court.

Parry & Co. v. *Appasawmy Pillai*, [(1899) I.L.R., 22 Mad., 407], distinguished.

Siva Raman Chetty v. *Iburam Saheb*, [(1895) I.L.R., 18 Mad., 327], distinguished.

SECOND APPEAL against the decree of T. T. Rangachariar, Subordinate Judge of Kumbakonam, in Appeal Suit No. 27 of 1908, presented against the decree of K. S. Lakshmi Narasa Ayyar, District Munsif of Valangiman, in Original Suit No. 161 of 1907.

* Second Appeal No. 1095 of 1908.

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The plaintiff was an endorsee of a promissory note executed for Rs. 1,500 by the defendant in favour of one Ka. Ibram Rowthan. The promissory note was executed at Kandy in Ceylon where the defendant was at that time carrying on trade in sundry articles. The plaintiff brought a suit to recover the amount of the promissory note in Suit No. 17114 of 1905 on the file of the District Court of Kandy. The suit was based on a negotiable instrument and the practice followed in Ceylon was similar to that described in Chapter XXXIX of the Civil Procedure Code. The defendant applied by his vakil to the District Court of Kandy for permission to defend the suit. The application was supported by an affidavit of the defendant wherein he pleaded discharge of the debt due on the promissory note as described therein and asserted that he had a good and honest defence on the merits.

The Kandy Court granted permission to defend on condition of his furnishing security for the amount of the promissory note. The defendant not complying with the order a decree was passed against him.

On this decree the present suit was filed in the Munsif's Court of Valangiman. The Munsif held that the defendant was not residing in Ceylon at the time of action; that the Court of Kandy had no jurisdiction and that the defendant had not submitted to the same and dismissed the suit.

The Subordinate Judge confirmed this decree.

The plaintiff appealed to the High Court.

T. Rangachariar, M. K. Narayanasami Ayyangar and *K. B. Ranganatha Ayyar* for appellant.

The Hon. The Advocate-General and *T. R. Venkatarama Sastri* for respondent.

JUDGMENT.—The appellant in this second appeal sued in the District Munsif's Court of Valangiman upon a judgment which he had obtained against the present respondent in the District Court of Kandy for a certain sum of money due on a promissory note. Both the District Munsif and the Subordinate Judge in appeal, dismissed the suit on the ground that the judgment of the Ceylon Court having been passed *in absentem* was not binding upon the respondent who is a native of British India and was not resident at the time of the action in Ceylon. They also found against the contention of the appellant that the respondent had submitted himself to the jurisdiction of the Ceylon Court.

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Upon the first question the contention of the learned vakil for the appellant is, that rules of private international law apply only to judgments of Courts of foreign Independent States and not to that of a Court of a country which is subject to the same sovereignty as the country in which the judgment in question is sued upon. This proposition, to support which there is really no authority, is obviously untenable. The Ceylon Court being outside the limits of British India is a foreign Court as defined by section 2, Civil Procedure Code (Act XIV of 1882), and its judgments are foreign judgments. That being so, the recognition of such judgments by a Court in British India would *primâ facie* be subject to all the rules which govern foreign judgments. And we are not aware that the validity of a foreign judgment when it is obtained in the *forum* of a country with a system of administration and judicature separate and distinct from that of the country in which it is sued upon, though both the countries may owe allegiance to the same sovereign, is, apart from especial legislation, regulated by rules different from those which regulate the operation of other foreign judgments. Perhaps the phrase Private *international* law—which has however the sanction of authority and long usage—is as pointed out by Mr. Dicey (see his Conflict of Laws, Introduction, page 15) misleading and has, as he says, given rise to many misconceptions. In fact, the assumption underlying the entire argument addressed to us by the learned vakil for the appellant on this point is that when considering the question of application of private international law to foreign judgments one must understand the word international in the same sense in which it is used when speaking of the usages and customs regulating the public relations *inter se* of Independent States. As for authority, he has referred us to certain passages in the judgment of Lord Selborne in *Gurdyal Singh* v. *Raja of Faridkot*(1), the leading case on the subject of foreign decrees. But in that case the present question did not arise at all, for there the judgment sued upon was that of an Independent Native State, and if Lord Selborne in stating the general rules of private international law relating to the enforcement of foreign decrees speaks with particular reference to judgments of Courts in foreign independent territories, that is clearly

(1) (1895) I.L.R., 22 Calc., 222.

because the question before the Board arose with reference to the judgment of such a Court and not that he wanted to confine the application of the rules of international law to judgments of such Courts alone. Considerable reliance was also placed on behalf of the appellant upon the decision in the case of *Moazzim Hossein Khan* v. *Raphael Robinson*(1), but, as we read the judgments of Maclean, C.J., and Banerjee, J., in that case the ground on which the judgment of the High Court of Justice in England obtained *in absentem* in a personal action against one of the defendants, a resident of British India, was upheld, was that a statute of the British Parliament which is also the Supreme Legislature for India gave jurisdiction to the English High Court in actions of a particular class over non-resident British subjects. We are not concerned here with the question whether the decision correctly appreciated the scope of certain orders and rules of English practice upon which the High Court in England acted, but the conclusion arrived at in that case is, we take it, based on especial legislation of the Supreme Legislature (see pages 647 and 648). Otherwise it would be difficult to reconcile that decision with the ruling in *Kassim Mamoojee* v. *Iauf Mahomed Sulliman*(2) to which also Maclean, C.J., was party, and where it was held that the judgment of a Court in Mauritius passed *in absentem* imposing personal liability upon a native of British India, was a nullity. There the Chief Justice of the Calcutta High Court says, "I think the defendant here was a foreigner within the meaning of that term as used in the cases I have mentioned, otherwise the result would be that, upon a judgment obtained in a Court of any colony of the British Crown against an absent person who was not a native of, or either permanently or temporarily resident or domiciled within that colony at the time of the suit or of the judgment passed against him *in absentem*, he might be successfully sued upon that judgment in any other Court within the British dominions. This view appears inconsistent with the decision in the case of *Turnbull* v. *Walker*(3)." This is a direct authority negativing the appellant's position and it seems that no doubt was ever entertained that for the purposes of private international law two provinces, part of the same Empire,

(1) (1901) I.L.R., 28 Calc., 641. (2) (1902) I.L.R., 29 Calc., 509.
(3) (1892) 67 L.T. Rep., 767.

may be treated as foreign to each other. For instance the judgment of a West Australian Court was in *Emanuel* v. *Symon*(1), assumed, without any question at the bar, to be subject to the rules of private international law: and the judgments of the Scotch and the Irish Courts apart from the Judgments Extension Act have always been considered in England to be governed by those rules. (See Halsbury's 'Laws of England,' vol. VI, page 291.)

It is then argued, that the Ceylon Court having derived authority from the British Crown by the Charter of 1833, section 24 (Ceylon Legislative Enactments, vol. I) and by section 9 of Ordinance No. 2 of 1889 (Ceylon Legislative Enactments, vol. II, page 576) passed by the Legislative Council of Ceylon under the general power of legislation conferred on them by the British Parliament, to adjudicate in a matter in which the cause of action arose within its jurisdiction, it must be held that the Imperial Parliament empowered the Ceylon Court in such cases to bind by its decree a defendant who is a resident of British India and subject of the British Crown, although he never resided in Ceylon at the time of the action or submitted himself to the jurisdiction of the Ceylon Court. We shall assume that the British Parliament, if it so thought fit, might confer authority on the Ceylon Courts to exercise jurisdiction over residents of British India *in absentem* in a personal action of the kind under consideration, and that, if such jurisdiction were conferred, the case would probably fall within the dictum of Lord Selborne in *Gurdyal Singh* v. *Raja of Faridkot*(2) where he says at page 238, "As between different provinces under one sovereignty (*e.g.* under the Roman Empire) the Legislation of the Sovereign may distribute and regulate jurisdiction." But such jurisdiction having regard to the principles of International Law would only be recognized in British India if it was conferred by the Supreme Legislature by express and clear words. In the absence of any express enactment the ordinary "presumption that the jurisdiction of all Courts is properly and strictly territorial would not be displaced, just in the same way as a contract on the part of an absent foreigner to submit himself to the jurisdiction of the *forum* of a country to which he owes no allegiance, if not

(1) (1908) 1 K.B., 302. (2) (1895) I.L.R., 22 Calc., 222.

express, would not be inferred as a matter of implication." (See the case of *Emanuel* v. *Symon*(1) already referred to.)

In this connection it is important to bear in mind the distinction between the question of validity and operation of a decree within the territorial limits of the country of the *forum* which passed it and its recognition outside such limits. To the former question International Law has nothing to say, while no amount of mere territorial legislation can enforce its recognition beyond the territory itself. Thus although the decree sued upon in the present case may be perfectly valid in Ceylon, it will not be recognized by a British Indian Court if it be in violation of any of the well established doctrines of International Law.

The next argument of Mr. Rangachari, the appellant's vakil, in connection with his first contention, that a decree based on a contract imposing personal obligation upon an absent foreigner is countenanced by the comity of nations if the defendant entered into the contract in the territory of the *forum* which passed the decree, is no longer worth any serious consideration after the decision in *Gurdyal Singh* v. *Raja of Faridkot*(2). But reference has been made to *Tadepalli Subba Rao* v. *Nawab Sayed Mir Gulam Allikhan of Banganapalli*(3) as laying down the law otherwise. All that the case decides however is, that a non-resident foreigner who is subject of a Protected Native State may be sued in the Courts of British India if the cause of action arose within the jurisdiction of any such Court; but the learned Judges in that case, one of whom was Subrahmania Ayyar, J., were not called upon to consider the validity of such a judgment outside British India. There are, no doubt, words in the judgment of Subrahmania Ayyar, J., which would show that he overlooked the distinction I have just alluded to, but he himself took the opportunity afforded to him in a subsequent case in *Srinivasa Moorthy* v. *Venkata Varada Ayyangar*(4) to correct the misapprehension (see page 278).

Upon the other question however, whether the respondent submitted to the jurisdiction of the Ceylon Court, we are unable to agree in the view which has commended itself to the lower Courts. What happened was this:—The respondent, a native of the Madras

(1) (1908) I.K.B., 302.
(2) (1895) I.L.R., 22 Calc., 222.
(3) (1906) I.L.R., 29 Mad., 69.
(4) (1906) I.L.R., 29 Mad., 239.

Presidency, executed the promissory-note in question at Kandy where he was then carrying on business. But at the time the suit to recover on the note was instituted in the District Court of Kandy he had left Ceylon and was residing at a village in Kumbakónam where he was served with the summons of the Kandy Court. In answer to the summons which was issued under the summary procedure relating to suits on Negotiable Instruments laid down in Chapter LIII of the Ceylon Ordinance II of 1889 and which is substantially the same as enacted in section 532 of the Indian Civil Procedure Code of 1882 and in Order XXXVII of the Indian Civil Procedure Code of 1908, the respondent appeared through a duly appointed Attorney and applied for leave to defend the suit on the allegation that the note which he admitted he had made had been discharged. He filed an affidavit in support of his allegation, but the learned Judge having regard to certain facts doubted the good faith of the defence and granted leave to the respondent conditional upon his furnishing security. The respondent failed to furnish the required security and judgment was accordingly entered against him.

The question is did the respondent by appearing in obedience to the process of the Kandy Court and applying for leave to defend the action—neither of which he was obliged to do—without raising any objection to its jurisdiction, voluntarily submit himself to the jurisdiction of that Court? The answer must be in the affirmative. And it would be clear bad faith on his part having once elected to submit to the *forum* chosen by his opponent and taken the chance of a decision in his favour in that *forum* to turn round and say afterwards when the decision has gone against him that the judgment was without jurisdiction. This according to the doctrines of International Law he cannot be permitted to do. (See *Emanuel* v. *Symon*(1).) But the learned Advocate-General who appears for the respondent argues that according to section 704 of the Ceylon Ordinance II of 1889 a defendant in an action under the summary procedure can appear *or* defend the action only after leave is granted and hence he contends that if leave was refused or if leave having been granted, the defendant did not appear in pursuance of such leave—and in this respect it would make no difference whether the leave if granted was conditional

(1) (1908) 1 K.B., 302.

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or absolute—he cannot be held to have appeared in the action at all and submitted to the jurisdiction of the Ceylon Court. We think the words "appear or defend" occurring at one place in section 704 which runs thus: "In any case in which a plaint and summons are in such forms respectively, the defendant shall not *appear or defend* the action unless he obtains leave from the Court as hereinafter mentioned so to appear and defend . . ." are the equivalent of "appear and defend" and clearly refer to appearance for the purpose of defending the action in accordance with the leave granted and do not imply that appearance for the purpose of obtaining leave is not to be deemed appearance in the action at all. (See also section 705.) But what we are concerned with is not the question whether appearance in order to apply for leave is or is not appearance in the action for certain purposes contemplated in Chapter LIII of the Ordinance, but whether appearance in answer to the process of the Ceylon Court without any protest whatever and applying for leave to defend the action do not show that the respondent submitted to its jurisdiction. It is not even necessary that submission must be by an act done in the course of the action itself, for it can be constituted by a contract to that effect entered into between the plaintiff and the defendant previously to the action. That the conduct of the respondent amounted in this case to submission hardly admits of any doubt, as we have already indicated, and in this view we are supported by the case of *Voinet* v. *Barrett*(1). There the defendant having appeared and taken part in certain proceedings of a preliminary nature was held to have submitted to the jurisdiction of the Court although he eventually allowed judgment to go against him in default of appearance at the time of hearing. The learned Advocate-General has cited the case of *Parry & Co.* v. *Appasami Pillai*(2), as an authority in his favour. But there the defendant who appeared in order to escape the inconvenience of arrest and attachment of property in a foreign territory objected at the same time to the jurisdiction of the foreign Court though ineffectually and that was held to show that his submission was not voluntary. In *Sivaraman Chetti* v. *Iburam Saheb*(3) also quoted by the Advocate-General, the facts of which are not fully

(1) (1885) 55 L.J.N.S. (Q.B.D.), 39. (2) (1880) I.L.R., 2 Mad., 407.
(3) (1895) I.L.R., 18 Mad., 327.

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set forth in the report, it seems that the defendant had instructed a vakil to defend the action but at the time of the hearing the vakil stated that he had no instructions and thereupon judgment was given against the defendant *ex parte*. There the learned Judges while recognizing the force of the rule that a defendant who has taken his chance of a decision in his favour cannot afterwards take exception to the jurisdiction held that on the facts of the particular case before them there was in fact no submission. It is not for us to consider whether the view they took of the facts in that case was correct or not, but there is nothing in the judgment of Collins, C.J., and Best, J., to indicate that they intended to lay down broadly that if the defendant allows judgment to be passed against him by a foreign Court in default of appearance although he might have otherwise submitted to its jurisdiction the plaintiff cannot sue upon that judgment in the *forum* of the defendant's country. No doubt a judgment of a foreign Court which does not decide upon the merits of the dispute—for instance if a suit is dismissed as being barred by the law for limitation of suits prevailing in that Court—cannot be pleaded as a bar to a suit instituted in the Court of plaintiff's domicile on the same cause of action. The cases of *The Delta. The Erminia Foscolo*(1) and *The Challenge and Duc D'Aumale*(2) were cases of that description. But we are not dealing with a question of that nature in the present case.

In the view we have expressed we reverse the judgments of both the lower Courts and decree the plaintiff—appellant's suit. There will be judgment for the plaintiff for Rs. 1,873-0-5 with interest at 6 per cent. per annum from the date of suit until payment. The plaintiff will have his costs throughout.

(1) (1876) 1 P.D., 393. (2) (1904) P.D., 41.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sankaran-Nair.

1909. March 12, 24.

KANDASAMI MUDALI AND OTHERS (PLAINTIFFS), APPELLANTS,

v.

SUBROYA MUDALI AND OTHERS (DEFENDANTS), RESPONDENTS.*

Public street, right to carry religious processions in—Custom—Right to obstruct such processions not claimable on the ground of usage or custom—When proof of damage necessary in suit brought for obstruction of procession.

Persons of all sects and creeds are equally entitled to carry religious processions along public streets and thoroughfares and no particular sect can claim, on the ground of custom or immemorial use, an exclusive right to carry processions through such streets. The exercise of such right must not interfere with the ordinary use of such streets by the public and must be subject to such directions as the Magistrate may lawfully give to prevent obstructions of thoroughfare or breaches of public peace.

Sadagopachariar v. *Krishna Moorthy Row*, [(1907) I.L.R., 30 Mad., 185 at 190], referred to.

An action for obstructing a procession may not be maintainable without proof of special damage. Where, however, an illegal order of the Magistrate has been procured restraining such procession, a suit to declare the right to carry such procession is sustainable without such proof, the cause of action being the improper order so obtained by the defendants.

SECOND APPEAL against the decree of T. M. Swaminatha Ayyar, District Judge of Chingleput, in Appeal Suit No. 27 of 1905, presented against the decree of V. Swaminatha Ayyar, District Munsif of Poonamallee, in Original Suit No. 439 of 1903.

In the village of Saidapet there are three temples called the Karaneswara, Subramania and Srinivasa. The first is situated on the east, the last on the west and the second in the middle of the village. Each has separate Madavidhies on streets forming a square for its processions to pass. The streets called the Jayaram Chetty and Kuthadum Pillayar Koil streets run parallel one each side to Sambadava and Subramaniaswami Koil streets which are said by defendants to form the Madavidhies of the Subramania temple. The plaintiffs as trustees of Subramaniaswami temple

* Second Appeal No. 1502 of 1905.

claimed a right to carry that idol in procession through the Jayaram Chetty and Kuthadum Pillayar Koil streets alleging that those streets were within the circuit of that temple.

The defendants Nos. 2 and 4, who were two of the five trustees of the Karaneswara temple, objected to Subramania being carried in procession along the Kuthadum Pillayar Koil street on the ground that it was within the circuit of Karaneswara and lay in Karanai which is a separate village from Saidapet. They also contended that the street is a private one and that the plaintiffs or their predecessors in office never carried Subramania through that street. Defendants Nos. 6 to 9 who are the trustees of Srinivasa temple similarly contended that Jayaram Chetty street was within their temple's Madavidhi and that the right claimed in the suit was an innovation. It was also contended that the claim was barred since it was admittedly denied by the defendants so long ago as 1894.

The remaining facts are stated in the judgment.

The District Munsif dismissed the suit and his decree was confirmed on appeal.

The plaintiffs appealed to the High Court.

T. R. Ramachandra Ayyar, *T. R. Krishnaswami Ayyar* and *G. S. Ramachandra Ayyar* for *K. B. Ranganatha Ayyar* for appellants.

The Government Pleader for tenth respondent.

P. R. Sundara Ayyar, C. V. Anantakrishna Ayyar and ***R. V. Seshagiri Rao***, for second, fourth, sixth, seventh and eighth respondents.

JUDGMENT.—The suit is brought for a declaration that the plaintiffs, the trustees of the Subramanyan Koil temple, are entitled to take their idols in procession through the Kuthadum Pillayar Koil and Jayaram Chetty streets of Saidapet. The plaintiffs plead that it has been customary to carry these idols in procession through these streets, and they contend that even independently of custom they are entitled to do so as the streets are public streets. An order passed by the District Magistrate under section 144 of the Criminal Procedure Code restraining the plaintiffs from carrying their idols in procession through these streets is the cause of action alleged. The defendants Nos. 2 to 4, the trustees of the Karani temple, plead that the Kuthadum Pillayar street belongs to that temple, and to the owners of the houses on either side of it; similarly defendants

Nos. 6 to 9 plead that Jayaram Chetty street belongs to the Perumal temple of which they are trustees and to the owners of the houses on either side of the street. Both of them deny that they are public streets, they deny the custom set up on behalf of the plaintiffs and they also maintain that it is against the sastras and law to allow the trustees of the Subramanyan temple to carry the idols in procession through these streets.

Both the Courts have found that the streets are public streets. They have also found that the plaintiffs have not established any custom of carrying the idols of their Subramanian Swami temple in procession along the two streets in question, although they may have done so on special occasions. The munsif further held that even if it is a public street, yet the plaintiffs have no right at common law to carry their idol in procession through the public streets or to use such streets for the purpose of religious worship when the idol is carried in procession. This, of course, involves the result that the defendants, the trustees of the other temples, also have not the right to use those streets for the religious processions of their own idols. It was also held by the munsif that, even assuming that the plaintiffs have got this right, still, as no special damage has been proved, the suit is not maintainable. On appeal, the Judge disagreed with the munsif on both the questions which he had decided against the plaintiffs. He found that the plaintiffs are entitled to maintain the suit, though no special damage has been proved. He further held that ordinarily, the trustees and the other persons interested would be entitled to use a common highway to carry their idols in religious processions. But he was further of opinion, if we have correctly understood his argument, that festivals and processions in Hindu temples are governed by rules laid down in the various *agamas* (sacred writings of the Hindus in regard to ceremonials) and as it is laid down in the *agamas* that, when an utsavam (festival) is to take place, certain ceremonies, such as *navasandhi* have to be performed and that another deity should not be carried in procession within those limits so long as the effect of that ceremony is believed to exist: and the defendants—trustees—having performed the *navasandhi* in these streets, the plaintiffs ought not to be allowed to take their idols in procession. On this ground he dismissed the plaintiff's claim.

In appeal it was contended before us that the Judge's decision is opposed to the various decisions of this Court and the right of

the plaintiffs to use a public highway for religious processions must be recognised. As to the special ground on which the Judge has relied, we may observe that the "grandha" which has been relied on is not shown to be of any authority whatever, and the defence witness examined is really not an expert witness. We attach no value therefore to the evidence of this witness, the gurukkal, or to the grandha, Exhibit XVIII. But, whatever may be the value of that grandha, we are of opinion that it has now been settled by a course of decisions, with which we agree, that the right claimed by the plaintiffs ought to be upheld.

We proceed to refer to those decisions, as it has been earnestly pressed upon us by Mr. Sundara Ayyar that a decision to that effect would be entirely opposed to the customary law of the country.

In *Muthialu Chetty* v. *Bapun Saib*(1), the rule of law is stated in these terms: "It is a right recognised by law that persons may for a lawful purpose, whether civil or religious, use a common highway by parading it attended by music, so that they do not obstruct the use of it by other persons." And passing in procession attended by music is stated to be one of those purposes: and it was further observed that "if the procession be of a religious character the prohibition of it may be an interference with the free exercise of religion."

Similarly in *Parthasaradi* v. *Chinna Krishna*(2) it is decided that "persons of whatever sect . . . are entitled to conduct religious processions through public streets so that they do not interfere with the ordinary use of such streets by the public and subject to such directions as the magistrates may lawfully give to prevent obstructions of thoroughfare or breaches of the public peace". In the Salem case *Sundaram* v. *The Queen* and *Ponnusami* v. *The Queen*(3) which was heard by a Bench of three Judges, it was pointed out that as long ago as 1857 the right to go in procession through certain streets attended with music, etc., was held to be a natural right inherent in every subject of the State and that user was not necessary to the creation of such a right. With reference to the privileges claimed on the ground of caste or creed, the Chief Justice in that judgment observed "that they (the privileges claimed) had their origin in

(1) (1880) I.L.R., 2 Mad., 140 at p. 141.
(2) (1882) I.L.R., 5 Mad., 304 at p. 309.
(3) (1883) I.L.R., 6 Mad., 203.

times when a State religion influenced the public and private law of the country and are hardly compatible with principles which regulate British Administration, the equal rights of all citizens and the complete neutrality of religion." He also pointed out that "the prejudices of particular sects ought not to influence the law." The other two learned Judges agreed with the Chief Justice. Then, in *Sadagopachariar* v. *Rama Rao*(1) the same contentions were put forward as are now raised before us and the proposition that the right to conduct religious processions through public streets, with the qualifications already stated is a right inherent in every person was again reaffirmed, and it was held that a suit based upon an alleged immemorial usage and custom, for a declaration that the plaintiffs had a right to claim that no procession of any deity venerated by the sect to which the defendants in that case belonged should take place in any street of the village was unreasonable. That decision went on appeal to the Privy Council and was affirmed in the case of *Shadagopachariar* v. *Krishna Moorthy Rao*(2), where their Lordships said that, as the streets in question were public streets, 'all members of the public have equal rights in them' and disallowed the contention of the appellants that they had either by immemorial usage or custom any right to prevent the worship and processions of any alien deity in those streets. We are of opinion that these decisions have conclusively settled the question that has been raised before us by the appellants. The defendants plead that custom must be followed. They contend that it was customary for their idols alone to be carried in procession and as a procession of the Subramania Swami is an innovation not sanctioned by the sastras it ought not to be allowed. This claim cannot b distinguished in principle from the similar claim advanced behalf of the Muhammadans in the Salem cases when they asked the prohibition of Hindu religious processions past their mosq with music, etc. It is identical with that advanced in the c *Parthasaradi* v. *Chinna Krishna*(3) and *Sadagopachariar* v. *Rama Rao*(1). From the judgment, in the case (*Parthasaradi* v. *Chinna Krishna*(3)) it appears that the Sadr Court had decided, following the opinions of the pundits, that it was contrary to

(1) (1903) I.L.R., 26 Mad., 376. (2) (1907) I.L.R., 30 Mad., 185 at p. 190.
(3) (1882) I.L.R., 5 Mad., 304 at p. 309.

custom to allow a pagoda to be erected by one sect or religious processions to be carried on, if such worship was opposed to the feelings generally of the people of that village and they had accordingly prohibited the Vadagalais from instituting any public worship within the usual range of the processions conducted in connection with the worship of the Tengalai Temple. When the matter was again brought into controversy in 1881, it was also found by the Munsif that the recital of repugnant mantrams by those who claimed such right of worship would seriously inconvenience and pain the worshippers at the older temple yet the claim to interdict processions was disallowed, though based on a usage, which had been enforced by the highest Court for a long time. The case (*Sadagopachariar* v. *Rama Rao*(1)) is similar. In both that case and in the case of *Parthasaradi* v. *Chinna Krishna*(2) immemorial usage and custom were pleaded, and the claim that was upheld by the Courts was found to be practically an innovation.

It appears to us that the respondent's contention is extravagant and unreasonable. We are unable to accept the contention put forward that the adherents of any particular religious sect are at liberty to prevent the adherents of another religious sect from carrying on a religious procession or from assembling for public worship in public streets on the ground that such worship had not hitherto been carried on and that it was opposed to their religious feelings. They do not contend that the streets cannot be used for religious processions or for public worship, as in that case they would be precluded from carrying their own idols in procession. Nor is it contended that they had acquired a right in derogation of the rights of the public to exclude all persons from conducting religious processions or assembling for public worship in those public streets. It is indeed difficult to see how such a right could possibly be acquired. It would be unreasonable to allow one sect or class to exclude another on the ground that by the performance of certain rites they have appropriated a public street, or any portion thereof, for their religious processions or worship. In this case it is also found, and that finding is not disputed before us, that some of the idols are being taken in procession through the said two streets and that even Muhammadans use these two streets for purposes of procession.

(1) (1903) I.L.R., 26 Mad., 376. (2) (1882) I.L.R., 5 Mad., 304.

Any such right as is contended for by the respondents would be inconsistent with the equal rights of all to use the public streets declared by their Lordships of the Privy Council. The judgments of Subrahmanya Ayyar and Bhashyam Ayyangar, JJ., in *Vijiaraghava Chariar* v. *Emperor*(1) are inapplicable, because what those learned Judges decided was that the user of a highway for religious worship is not lawful; a decision which, if followed in this case, would render the religious processions of the defendants also unlawful, whereas in this case it is claimed by the defendants that their processions with idols are lawful and those of the plaintiff's alone are unlawful. Moreover, the decision of Bhashyam Ayyangar, J., does not refer to the cases we have already referred to, and Subrahmanya Ayyar, J., does not dissent from them. If these judgments are opposed in principle to the decisions we have referred to, we cannot attach any weight to them, more particularly, after the confirmation by the Privy Council of the judgment in *Sadagopacharlar* v. *Rama Rao*(2) where a right, in all respects similar to that now advanced by the plaintiffs, has been upheld. The next question that was argued before us is that as the plaintiffs were not shown to have sustained any special damage, the suit is not maintainable. It is true that where a religious procession along a highway has been obstructed, no action can lie in the absence of any special damage. (See *Satku Valad Kadir Sausare* v. *Ibrahim Aga Valad Mirza Aga*(3) followed in *Kazi Sujaudin* v. *Madhavdas*(4).) But in the present case the cause of action is not the obstruction, but it is the order passed by the Magistrate prohibiting the plaintiffs from carrying on the religious procession. In the case to which we have already referred, *Muthialu Chetti* v. *Bapun Saib*(5), this Court decided that the plaintiffs in that suit had a good cause of action against the defendants who procured the order of the Magistrate. Similarly, in *Keoni Meera Sahib* v. *Mahomed Meera Sahib*(6), where the plaintiffs were restrained by an order passed by the Magistrate from the performance of certain funeral ceremonies until they obtained an order from a Civil Court, it was held that the plaintiffs were entitled to bring a suit for a declaration of their rights. The real distinction appears to be, as pointed out in *Kazi Sujaudin* v. *Madhavdas*(4) that in the

(1) (1903) I.L.R., 26 Mad., 554,
(2) (1903) I.L.R., 26 Mad., 376.
(3) (1878) I.L.R., 2 Bom., 457.
(4) (1894) I.L.R., 18 Bom., 693.
(5) (1880) I.L.R., 2 Mad., 140 at p. 142.
(6) (1907) I.L.R. 30 Mad., 15.

one case, the cause of action is the alleged obstruction and in the other the improper order issued by a Magistrate at the instance of the defendants. We are, therefore, of opinion that the suit is maintainable. We, therefore, reverse the decrees of the Courts below and declare that the plaintiffs are entitled to carry their idols in religious procession or to assemble for purposes of public worship in the same manner as the defendants in the two streets, viz., Koothadum Pillayar Koil and Jayaram Chetty streets, and pass the decree as prayed for. The tenth defendant is entitled to get his costs throughout from the plaintiffs. The plaintiffs are entitled to their costs throughout from the other defendants.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Abdur Rahim.

1909. March 12. April 16.

KUTTI CHETTIAR AND OTHERS (FIRST AND SECOND PLAINTIFFS AND THEIR LEGAL REPRESENTATIVES), APPELLANTS,

v.

SUBRAMANIA CHETTIAR AND OTHERS (DEFENDANTS AND LEGAL REPRESENTATIVES OF SECOND AND TWELFTH DEFENDANTS), RESPONDENTS.*

Sale in execution of mortgage decree—Rights of purchasers at different Court sales of same property—Purchaser at prior sale on subsequent mortgage takes the entire interest of judgment-debtor—Fraudulent sale, proof of—Relief not claimed in plaint, granting of.

The same property was sold by Court at different times in execution of two mortgage decrees obtained against such property. The first sale was in execution of the decree on the subsequent mortgage obtained in a suit in which the prior mortgagee was not impleaded and was held while the suit on the first mortgage to which the second mortgagee was no party was pending. The purchaser at the subsequent sale on the first mortgage sued to recover possession from the prior purchaser of the property and the plaint also contained a prayer for such other relief as the plaintiff may be found entitled to:

Held, that all the interest of the judgment-debtor passed to the purchaser at the first sale and the purchaser at the second sale of the judgment-debtor's interest in the property took nothing, as the judgment-debtor had then no

* Second Appeal No. 341 of 1905.

WHITE, C.J., AND ABDUR RAHIM, J.

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saleable interest in the property. The suit to recover possession was not therefore maintainable.

Venkatanarsammah v. *Ramiah*, [(1879) I.L.R., 2 Mad., 108], followed.

Akatti Moidin Kutty v. *Chirayil Ambu*, [(1903) I.L.R., 26 Mad., 486], followed.

The rights of a prior or subsequent encumbrancer will remain unaffected by a sale held in execution of a decree to which he was no party. Any such rights of the plaintiff cannot be enforced in the suit brought by him for possession, as a claim for redemption or for sale is not of the same nature as a claim for ejectment and cannot be tacked on and decreed in a suit brought for ejectment.

Gopi Narain Khauna v. *Bousidhar*, [(1905) I.L.R., 27 All., 325 at p. 331], distinguished.

Venkatramana Iyer v. *Gomperts*, [(1908) I.L.R., 31 Mad., 425], distinguished.

The mere fact that a defendant did not contest the plaintiff's claim which was in part excessive, is not sufficient to show fraudulent collusion between the plaintiff and defendant.

SECOND APPEAL against the decree of S. Gopalachariar, District Judge of Salem in Appeal Suit No. 346 of 1903, presented against the decree of K. Ramanatha Iyer, Principal District Munsif of Salem in Original Suit No. 802 of 1902.

The facts of the case are stated in the judgment.

The Hon. The Advocate-General and *P. S. Subrumania Aiyar* for third to fifth appellants.

T. Subramania Aiyar for first and fourteenth to twentieth respondents.

JUDGMENT.—The appellant instituted an action by which he sought to recover possession of a house from the defendants (respondents) and further prayed in the alternative for partition of the house and delivery of possession to him of one moiety of it on payment by him to the defendants of one-half of the amount for which the latter bought the property at a Court auction sale held in February 1900. The circumstances which led the plaintiff to make his claim are as follow :—

The house in question and 2 shops belonged originally to two undivided brothers of a joint Hindu family, viz., Kuppusami and Basappa. On the 29th June 1894 Kuppusami hypothecated a moiety of the house and also of one of the shops to one Veeraraghava Chetty. Then the two brothers on the 14th July 1894 partitioned the properties and in the partition each of them got a shop while the entire house fell to the share of Basappa who agreed to pay the whole of the debt payable to Veeraraghava. On the 22nd August 1895 both Kuppusami and Basappa joined in

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selling the two shops to one Chockalingam Chetty. On the 29th January 1896 Veeraraghava instituted a suit No. 38 of 1896 to enforce his mortgage impleading Kuppusami, Basappa and Chockalingam Chetty as defendants and obtained, on 27th January 1897, the usual mortgage decree and in execution thereof took steps to sell the attached properties which included the moiety of one of the two shops bought by Chockalingam and the half share of the house in dispute. Chockalingam in order to save the moiety of one of the shops in which he was interested paid the entire decree amount to Veeraraghavan and the sale was stopped. This was on 7th October 1897. While the suit instituted by Veeraraghavan was pending, Basappa and his sons had on 2nd October 1896 mortgaged the entire house and some other property to Ambalathadi Chetty. The result therefore is that Chockalingam by paying the decretal amount due to Veeraraghavan became subrogated to Veeraraghavan's rights as the first mortgagee of one moiety of the house while Ambalathadi Chetty would have a second charge over that moiety and a first charge over the other.

Chockalingam next instituted a suit (Original Suit No. 191 of 1898) against Kuppusami and Basappa and their sons to recover the amount of Veeraraghavan's decree which Chockalingam had paid and asked not only for a personal decree but also for sale of the house question. To this Ambalathadi Chetty was not made a party, and the impleaded defendants not having appeared a decree was made on 26th November 1898, *ex parte*, in favour of Chokalingam's representatives, Chokalingam having died in the meantime, in the nature of a mortgage decree ordering sale of the house and other properties of the judgment-debtors, in default of payment by them of the decree amount. In execution of that decree Chokalingam's representatives, the defendants in the present suit, purchased the whole of the house and the sale certificate was issued on the 16th October 1900 and possession delivered to them on the 19th November 1900. On the 29th August 1899, Ambalathadi Chetty instituted a suit (original suit No. 3 of 1899) to enforce the mortgage executed in his favour by Basappa and his sons on the 2nd October 1896 and obtained a decree on 27th November 1899. It was in execution of that decree that the second plaintiff in the present suit purchased the entire house in February 1901. The defendants in this action were not made parties to Ambalathadi Chetty's suit. Upon these facts which are undisputed both the lower Courts

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were right in holding that the plaintiff was not entitled to obtain possession of the house or of a moiety of it. His purchase was subsequent to the defendant's purchase and to the delivery of possession of the property to the latter. Can it be said that the Court auction sale at which the defendant brought did not pass the property to them ? The only ground for so holding which has been suggested is that Ambalathadi Chetty's action to enforce his mortgage was pending at the time of the execution proceedings in which the sale was held and the defendant's purchase, although at a Court auction sale, must be subject to the result of that action. Take it to be so. All the right which the decree made in favour of Ambalathadi Chetty gave him was to realize the decretal amount by sale of the house, and all that the plaintiff standing in the shoes of Ambalathadi Chetty can claim is to exercise that right against the defendants as the transferree of the judgment-debtor's rights in the property. The sale at which the defendants purchased the house was held in pursuance of a decree in their favour ordering it to be sold in payment of the debt due to their ancestor Chokalingam and that decree was made before the institution of Ambalathadi Chetty's suit. The decree was binding on the judgment-debtors the owners of the house unless it can be shown that it was obtained by fraudulent collusion between them and the defendants. The lower Appellate Court no doubt finds to that effect but this finding, being based merely on the fact that Chokalingam was not in law entitled to a charge on more than one moiety of the house and the defendants in that action did not contest his claim to a charge on the entire house, cannot evidently be sustained. These facts without more do not make out a case of fraud and collusion. No doubt, in the suit instituted by Chokalingam, Ambalathadi Chetty was not made a party and whatever interest therefore the latter had in the property at the time would not be affected by the decree which followed. He had then a mortgage charge on the entire house but a moiety of that house was admittedly subject to a prior charge in favour of Chokalingam. The decree that was passed in Chokalingam's suit made the other half also liable for payment of the debt due to Chokalingam but subject to a prior charge on that half in favour of Ambalathadi Chetty. When therefore defendants bought [redacted]house in execution of their decree no saleable interest was [redacted] in the judgment-debtor. As pointed out in

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Venkatanarsammah v. *Ramiah*(1), *Nanakchand* v. *Teluckdye Koer*(2), and *Akatti Moidin Kutty* v. *Chirayil Ambu*(3), where there is a question between the purchasers at two distinct Court sales held on different dates in execution of two several mortgage decrees the Court in deciding between the two competing titles is guided not by the dates of the several mortgages but of the several purchases. For both the mortgagees have an equal right to sell the property, and once it is sold at the instance of one mortgagee there is no further saleable interest left in the judgment-debtor to be sold again. Apart however from the effect of the two sales on the question of title to the property, the defendants as representatives of Chokalingam would have a first charge on one moiety, and the plaintiff claiming the rights of Ambalathadi Chetty has a second charge on that moiety and the plaintiff has a first charge on the other half and the defendants a second charge on that half. We are asked by the learned Advocate-General, who appears for the appellant, to give his client such relief as he may be entitled to upon the above state of facts even if he be held to have no right to the possession of the house.

Following the rulings in *Venkatanarasammah* v. *Ramiah*(1), *Akatti Moidin* v. *Chirayil Ambu*(3), we hold that any relief to which the plaintiff may be entitled by reason of his charges on the property cannot be enforced in this suit. In our opinion the Privy Council decision in *Gopi Narain Khauna* v. *Bansidhar*(4), and the decision of this court in *Venkataramana Iyer* v. *Gompertz*(5), to which the Advocate-General referred are distinguishable from the present case on the ground that the suits in those cases were mortgage suits. The ground of the decision of the Privy Council in *Ahmad Walikhan* v. *Shamshul Jahan Begam*(6), was that the plaintiff ought not by reason of his having claimed too much to be precluded from recovering an amount to which he was entitled. This case seems to us to be clearly distinguishable from the present case. The appeal is dismissed with costs of respondents Nos. 1 and 15.

(1) (1879) I.L.R., 2 Mad., 108.
(2) (1880) I.L.R., 5 Calc., 265.
(3) (1903) I.L.R., 26 Mad., 486.
(4) (1905) I.L.R., 27 All., 325 at p. 33.
(5) (1908) I.L.R., 31 Mad., 425.
(6) (1906) I.L.R., 28 All., 482.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Miller.

1909. January 12, 18, 18, 19, 26 to 29. February 3, 4, 5, 8, 9, 12, 15, 16, 17, 19, 22, 25, 26. April 21.

M. R. M. A. SUBRAMANIAN CHETTIAR (FIRST DEFENDANT), APPELLANT,

v.

RAJAH RAJESWARA DORAI *alias* MUTHURAMALINGA DORAI (MINOR) THROUGH HIS NEXT FRIEND RAJAH M. DINAKAR AND ANOTHER (PLAINTIFFS AND SECOND DEFENDANT'S SUCCESSOR), RESPONDENTS.*

Trustee, duties of—Discretionary power, exercise of—Improvident transaction of trustee not binding on beneficiary—Liability of transferee of trust estate—Compromise by trustee, when valid—Burden of proof—Decree may direct party benefiting by breach of trust to pay to the trust estate when removal of trustee is not asked for—Following trust property.

It is no answer to a charge of breach of trust that the trustee acted under competent legal advice.

A trustee is bound to make as reasonable a bargain in the interests of the beneficiary as circumstances will permit; and a transaction which circumstances show to be unreasonable or improvidently entered into, will not be upheld by Court.

A transferee from the trustee, who has notice of the trust, has notice that the trustee must act reasonably and prudently; and where such transfer is unreasonable or improvident, such a transferee will not be absolved merely because, in his opinion, the transaction was prudent and beneficial to the *cestui que trust*.

Where a transaction by the trustee is *primâ facie* improvident, it lies upon the trustee to show, as against the beneficiary, that it is one which the Court can uphold.

Where a breach of trust has been committed and a suit is brought by the beneficiary against the trustee and the party who has received money through such transaction to recover such money for the trust estate, it is open to the Court by its decree to direct payment of such money to the trustee by the defendant who has received such payment unless it is established that the beneficiary can get no relief unless he seeks to remove the trustee and procure the appointment of another—10 Mad. and 16 Mad., distinguished.

Where trust-money has, by a breach of trust, been paid by the trustee, the beneficiary is entitled to follow it as trust-property in the hands of the payee.

National Trustees Company of Australasia v. *General Finance Company of Australasia*, [(1905) A.C., 373], referred to.

Keating v. *Keating* [(1835) 46 R.R., 178], followed.

In re Barney, [(1892) 2 Ch., 265], distinguished.

Smith v. *Patrick* [(1901) A.C. 294], referred to.

Giyana Sambandha Pandara Sannadhi v. *Kandasawmi Tambiran* [(1886) I.L.R., 10 Mad., 375], distinguished.

Strinivasa Ayyangar v. *Strinivasa Swami* [(1893) I.L.R., 16 Mad., 31], distinguished.

* Appeal No. 106 of 1903.

WHITE, C.J., AND MILLER, J.

SUBRAMANIAN CHETTIAR *v.* RAJESWARA DORAI.

Quære.—Whether a trustee has power to enter into a compromise at the expense of the trust estate in a suit in which his own position as trustee was attacked.

APPEAL against the decree of W. Gopalachariar, Subordinate Judge of Madura (East), in Original Suit No. 6 of 1902.

The first defendant appealed.

The facts are set out in the judgment.

P. R. Sundara Ayyar, *K. Srinivasa Ayyangar*, and *A. K. Sundaram Ayyar* for appellant.

T. Subrahmania Ayyar for The Hon. The Advocate-General for second respondent.

The Hon. Mr. *V. Krishnaswami Ayyar* and *S. Srinivasa Ayyangar* for first respondent.

JUDGMENT.—This is an appeal from the decree of the Subordinate Judge of Madura (East). The plaintiff is the minor Raja of Ramnad. The first defendant was a creditor of the late Raja and is the party in whose favour the three instruments which the plaintiff seeks to have set aside were made. The second defendant is the trustee appointed under a deed of settlement (exhibit I, p. 398) executed by the late Raja on the 12th July 1895. The suit is brought for a declaration that an agreement of the 16th January 1899 between the first and second defendants (exhibit XLIX, p. 514) and two mortgages of the 6th and 13th July 1899 (exhibits LXXXII and LXXXIII, pp. 670 and 668) executed by the second defendant in favour of the first defendant are invalid and for an order that a sum of Rs. 43,000 paid under these instruments should be paid by the first defendant to the credit of the trust estate.

The circumstances in which the suit is brought are as follows:—The late Raja, who had contracted debts to the amount of some 20 lakhs, executed a deed of settlement on the 12th July 1895 (exhibit I, p. 398). By that deed, he conveyed the Ramnad Zamindari to the second defendant in trust for purposes mentioned in the deed. Stated quite generally, the object of the trust deed would seem to have been to save the estate in the interest of the Raja's son, the present plaintiff. After the execution of this deed the Raja continued to contract debts. His financial position, and his attitude towards the trustee are shown by a letter (exhibit II, p. 415) which he wrote, some 16 months after the execution of the deed, to the trustee, Mr. Chentsal Rao, who had

been appointed under the deed of settlement as co-adjutor for the purpose of advising the trustee, and to Sir Bhashyam Ayyangar, who was one of the three members of the Committee appointed by the deed.

In the meantime, negotiations had been entered into by the trustee with an English firm, Messrs. Ogilvy Gillanders & Co., with a view to the raising of a large sum of money on a mortgage of the estate, in order to clear off all the liabilities. On 18th June 1897, a preliminary agreement was signed between the trustee and the representative of Messrs. Ogilvy Gillanders & Co. (exhibit W, p. 227) and (exhibit IV, p. 425). These negotiations were conducted in England by Messrs. DeClermont and Donner and in India by the South Indian Export Company and by Messrs. Lovelock and Lewes on behalf of the proposed lenders, whom it will be convenient to refer to as 'the contractors,' on the one hand, and the trustee and the co-adjutor on the other hand.

Whilst these negotiations were going on, the first defendant, on 17th November 1897, commenced Original Suit No. 60 of 1897 in the Subordinate Judge's Court, Madura (East), for the purpose of getting the settlement of 12th July 1895, set aside, as having been made in fraud of creditors. The negotiations with the English firm turned mainly on the question of the postponement of the claims of the Raja and of the members of his family, who were entitled to be paid certain allowances under the deed of July 1895, to the payment of interest on the contemplated loan from the English contractors.

On the 29th September 1897, the co-adjutor wrote to Messrs. Lovelock and Lewes (exhibit DD, p. 242) confirming a telegram that the Raja was willing to give a charge on the zamindari free of the payment of the allowances of 66 or 76 thousand rupees. On the 26th November 1897, DeClermont and Donner in London wrote to the South Indian Export Company, Madras (exhibit XI, p. 457) enclosing a letter from the contractors stating that the latter insisted on the allowances to the Raja and the members of his family being postponed in full. On the 24th December 1897, the trustee wrote to the South Indian Export Company (exhibit XII, p. 439) to the effect that he was willing to try and agree to the conditions proposed. On the 19th February 1898, the trustee wrote to the co-adjutor (exhibit XVIII, p. 447) saying

that they should try and obtain the consent of the allowance-holders as soon as practicable. The trustee was only able to obtain the consent of the allowance-holders to the extent of 99 thousand out of 130 thousand. This is referred to in a letter from the co-adjutor to the South Indian Export Company, dated 24th March 1898 (exhibit XXXI, p. 457), in which he states that, as the amount of the allowances, the postponement of which is not possible, is small, he hopes the contractors will see their way to issue the loan. On 18th March 1898, he telegraphed to the co-adjutor (exhibit EE, p. 243) confirming a telegram of the Raja and saying that they must "let these two allowances alone together with the two small attached ones" (referring to the allowances with reference to which they were unable to obtain the consent for postponement) "and point out to them that under trust-deed we empowered to attend to service of interest prior to payment of allowances and therefore we can assure them without even consent of parties." On the 25th April 1898, the trustee wrote to the Raja (exhibit XXXV, p. 461). This is a document of very great importance since, with reference to the question whether the subsequent transactions which the plaintiff seeks to impeach can be upheld, the first question for consideration is whether the proposals made by the trustee in this letter and accepted by the Raja constituted a breach of trust. The agreement was sanctioned by the co-adjutor. This letter, according to the case of the first defendant, is the basis of the liability incurred by the trustee to the first defendant in the later instruments, which the plaintiff now asks to have set aside. The letter refers to the wish of the contractors that the allowances payable to the Raja and the other members of his family, amounting to Rs. 1,30,000 a year, should be made a second charge on the estate. It refers to a statement by the Raja that he would give his consent to this and also obtain the consent of the other members of the family, if the trustee agreed to pay him a sum of 4 lakhs of rupees. The letter goes on to state that the trustee is prepared to give him a mortgage bond for 4 lakhs of rupees on the security of a suitable portion of the Ramnad Zamindari—such security to be subsequent to the mortgage to the contractors. The letter states that the trustee would pay to the Raja every year up to 1908 a sum of Rs. 36,000 as interest on the 4 lakhs from the surplus proceeds of the estate and thenceforward Rs. 61,000 a year from the same source towards the principal and interest till

the whole of the amount is liquidated. The arrangement is to have effect only in the event of the Raja and the other members of the family agreeing to the postponement of their respective allowances.

On 27th May 1898 the Raja wrote to the trustee (exhibit XL, p. 466) asking him to obtain from one Ponnuswami Tevar a loan of one lakh on behalf of the Raja and to give him a mortgage on the estate for this amount out of the mortgage for 4 lakhs referred to in the letter of 25th April 1898. The loan obtained from Ponnuswami Tevar was carried out in accordance with the request of the Raja. (See exhibit LXII, p. 561.) The sanction of the co-adjutor was not obtained. (See evidence of trustee, p. 807.)

On the 30th June 1898 the late Sir V. Bhashyam Ayyangar gave a written opinion (exhibit FF, p. 243) apparently advising on behalf of the trustee to the effect that the allowance payable to the Raja's brother could not be enforced against a mortgagee unless it was shown that the mortgage was created with the intention of defeating the claim for maintenance and that it could not be contended that the intention of the trustee in creating the mortgage was to defeat that claim. Sir Bhashyam Ayyangar also advised that the trustee might, if so required, undertake in the mortgage deed that the service of the mortgage loan should have priority over the maintenance allowance. On 16th September 1898, Messrs. DeClermont and Donner wrote to the South Indian Export Company (exhibit XLI, p. 467) saying that the question had arisen as to the legal effect of any agreement by the allowance-holders to postpone their allowances. In connection with this question the opinion of Mr. J. D. Mayne was taken. His opinion (exhibit LIII (*a*), p. 520) is to the effect that it was not essential that the consent of allowance-holders to the postponement of their allowances should be obtained but that it was desirable that the signatures of as many as possible should be secured in the mortgage to be given to the contractors. This opinion is referred to in a letter of 23rd September 1898 from the London Solicitors of the contractors to the Madras Solicitors in which it is stated that the contractors will not insist on the maintenance-holders executing the deed, provided they entered into an agreement with the trustee agreeing to postpone their claims (exhibit XLII, p. 468).

This being the state of the negotiations with reference to the postponement of the allowances, the trustee, on the 16th January 1899, entered into an agreement (exhibit XLIX, p. 514) with the first defendant. This is one of the instruments which the plaintiff seeks to have set aside: and is also the instrument in pursuance of which the two mortgages, which are also asked to be set aside, were executed. On the 9th April 1899 the trustee entered into an agreement (exhibit XLV, p. 474) with the allowance-holders who had agreed to postpone their allowances that he would pay their allowances out of the rents, incomes and profits of the zamindari according to the terms of the settlement deed of July 1895.

On the 13th June 1899 the deed between the contractors and the trustee was executed (exhibit XLVIII, p. 478).

A letter written by the trustee on the 5th July 1899 to the co-adjutor (exhibit XLVI, p. 476), shows how the trustee purported to deal with the 4 lakhs of rupees referred to in exhibit XXXV. One lakh, out of the sum, borrowed from Ponnuswami Tevar had been paid to the Raja, Rs. 16,000 had been paid to another creditor on account of the Raja. Out of the sum which he had agreed to pay to the first defendant under exhibit XLIX, Rs. 2,91,416 were on account of the Raja. These sums exceeded the 4 lakhs by a sum of Rs. 7,416 and this amount the trustee said he intended to treat as an advance on the Raja's allowances and to adjust the same in due course.

On 6th July 1899, the trustee executed a mortgage to the first defendant (exhibit LXXXIII, p. 670) for Rs. 4,23,000 and odd. On 13th July 1899, the trustee executed a hypothecation bond on paddy to the first defendant (exhibit LXXXII, p. 668) for the balance of Rs. 50,000 which the trustee had covenanted to pay on the 3rd July 1899 within a week from that date, but which he had been unable to pay. The contention, putting it broadly, on behalf of the first defendant was that in order that the loan from England might be obtained, it was necessary to secure the postponement of the allowances, and that the agreement to give a mortgage for 4 lakhs to obtain this end was within the powers of the trustee and was a reasonable and proper exercise of his powers. It was argued that whether the claims of the allowance-holders would or would not in law be postponed to the mortgage to the contractors, the advisers of the English lenders desired that the consent of the allowance-holders should be obtained to the

postponement of their claims. We cannot help thinking that if the Raja had not incurred further liabilities after the deed of settlement of July 1895 [exhibit I, p. 398] and had not brought strong pressure to bear upon the trustee and those associated with him to relieve him from his financial embarrassments, we should have heard nothing of the transaction entered into by the trustee in exhibit XXXV: and it seems to us that the predominant motive of the trustee was to relieve the Raja.

The transaction [exhibit XXXV] is a curious one, since no money changed hands. What the trustee did was to undertake to charge the estate with 4 lakhs in favour of the Raja and subsequently to utilize this undertaking for the purposes of exhibit XLIX, by transferring the liability of the estate to the Raja to the first defendant. Exhibit XXXV is in the form of a series of proposals which were initialled by the Raja. Having regard to the fact that the consent of all the allowance-holders was never obtained, it was not contended that exhibit XXXV constituted an agreement of which specific performance could be obtained. The question was elaborately argued and many authorities were cited as to whether this transaction was within the powers conferred on the trustee expressly or by implication by the trust deed or under the general law. Paragraph 12 of the trust deed empowers the trustee to mortgage the trust property for the purpose of raising loans for payment of the debts specified in the third schedule to the trust deed. Assuming that it was within the power of the trustee to create a charge on the estate in favour of A without receiving any advance from A, but with a view to raising money from B for the purpose of paying off the scheduled creditors, the question is: was this power exercised properly and reasonably and in the interest of the estate?

The first point to be considered is: was the consent of the allowance-holders necessary in law? The contention on behalf of the plaintiff was that, under the provisions of the trust deed of July 1895, the trustee had power to postpone the allowances without obtaining the consent of the allowance-holders. Now the trust created was a trust subject to the payment of the debts of the creditors mentioned in the third schedule. Mr. Sundara Ayyar on behalf of the first defendant relied strongly on the provisions of paragraph 23 of the trust deed. Paragraph 23 enumerates the purposes to which the trustee shall apply the rents, incomes

and profits of the trust premises. In the fifth place he is to apply such part as may be required in payment of the debts of the scheduled creditors. In the sixth place he is to apply such part as may be required in payment to the allowance-holders mentioned in the second schedule, during their lives, of the monthly sums set opposite to their names. Paragraph 24 provides that the trustee shall not be bound to make the payments mentioned in the order in which they are mentioned, but that he might make them as and when required. Numerous authorities were cited on behalf of the first defendant to show that the enumeration of the payments in paragraph 23 imposed no obligation on the trustee to make the payments in the order mentioned: and Mr. Sundara Ayyar contended that paragraph 24 gave the trustee a discretion, that the payments to the allowance-holders must be as and when required, with reference to the provisions of the deed, and that the trustee could not carry out his discretion by exercising it once for all in favour of creditors, original or substituted.

On behalf of the plaintiff it was argued that "as and when required" meant "according to the exigencies of circumstances," and that the trustee, if not under an obligation, had a discretion to pay original debts or debts incurred for the purpose of discharging original debts, before the allowances.

We are of opinion that, on the construction of the deed of settlement, the trustee had power without the consent of the allowance-holders to postpone the allowances to the payment of the interest under the English loan. This appears to have been the view taken by the trustee in the telegram (exhibit EE, p. 243), to which reference has been made, sent shortly before making to the Raja the proposals contained in Exhibit XXXV. In his evidence the trustee said that though he had the power of postponement he shrank from incurring the ill-will of the Raja and the other allowance-holders by exercising his power without their consent. (See his evidence, pp. 801, 802.) The Raja also took the same view and, before exhibit XXXV was written, had himself agreed on his own behalf and on behalf of the allowance-holders to the postponement of the allowances. (See his telegram to the Indian Export Company, dated the 20th April 1898, exhibit Z, p. 239.)

We think too that there is no foundation for the contention that an undertaking by the trustee once for all to postpone

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the allowances to the service of the loan would be void as fettering the discretion given him by paragraph 24 of exhibit I or as assuming a power of postponement not conferred by that paragraph. The payments provided in paragraph 23 are to be made "as and when they shall be required" (paragraph 24) and there is nothing inconsistent with this in an undertaking that the calls upon the income shall rank in a particular order. The case is not analogous to those cited where a covenant is held to be void if it imports an undertaking to exercise in a particular way a power of appointment which the covenantor is to exercise by his will.

Here there is nothing to require the trustee to keep the discretion open, or to prevent him, if the circumstances required him to do so, from fixing once for all the order of payment.

Now, in these circumstances, was the trustee entitled to undertake to secure to the Raja the payment in instalments of a sum of 4 lakhs of rupees to enable him to pay off post-settlement debts not binding on the trust estate, in consideration of his agreeing to postpone his own allowance and to obtain the consent of the other allowance-holders to like postponement? The expenditure, by way of payment for assistance of this kind, of more than 14 per cent. on the loan under negotiation is *primâ facie* an extravagance, and the trustee seeks to justify it by alleging that the Raja would not without it have given his consent or obtained that of the other members of the family.

It may be taken that it was a matter of the highest importance to the trustee to obtain the loan of £175,000 for the purpose of paying off existing debts carrying high rates of interest. In these circumstances the obvious duty of the trustee was to take the best advice he could get and decide whether the postponement, if postponement was necessary, could not be effected without casting a burden of 4 lakhs on the estate. He does not seem to have done this until after his agreement with the Raja was practically concluded and it was found that the Raja was unable to obtain the consent of his brother, the holder of one of the largest allowances. He does not appear to have attempted, in the interests of the estate, to make the best bargain he could with the Raja in the first instance, or to come to a fresh agreement with the Raja when the Raja failed to obtain the consent of all the allowance-holders to postponement. He says that he had throughout the approval of the co-adjutor and the legal adviser Sir Bhashyam

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Ayyangar, and indeed that the agreement to pay the Raja's post-settlement debts was suggested by the former; we do not know in what form the case was put before the latter, the only opinion of his that is on the record being exhibit FF in which in June 1898 he gives reasons for believing that the trustee himself has power without the consent of the allowance-holders to postpone their claims on the income of the estate to those of the contractors. It is, in the face of this opinion, somewhat difficult to believe that Sir Bhashyam Ayyangar approved of the expenditure of 4 lakhs of rupees in buying an unnecessary consent, but, if he did, it must have been that he like the trustee was over-anxious to help the Raja, to pay off his subsequent debts and to save him from disgrace. Moreover it is no answer to a charge of breach of trust that the trustee acted under competent legal advice. *National Trustees Company of Australasia* v. *General Finance Company of Australasia*(1).

After taking the opinion of Mr. Mayne the contractors agreed to dispense with the consent of those of the allowance-holders who were obdurate, and they required the trustee to undertake to postpone all the allowances to the service of the loan, both before and after default [exhibit XLVIII, paragraphs 4, 5 and 6, p. 480] that is to say, while the trustee should remain in possession, and in the event of a default after the trustees for the debenture-holders should have assumed possession.

Now the Raja and the trustee say that the former would not have given his consent for less than 4 lakhs, and the trustee opines that the English contractors would not have dispensed with the Raja's consent: hence, it is argued, necessity for the payment is made out and the agreement must be upheld. But it seems to us that if the trustee had taken the considered opinion of Sir Bhashyam Ayyangar, before entering into any agreement with the Raja, and had laid the matter before the contractors, it is probable that no payment would have been made, or at any rate that the Raja would have modified his demands.

There is really no evidence that the Raja ever asserted a claim to rank before the service of the English loan, or that the trustee made any attempt to obtain his assistance for any price less than the payment of all the "subsequent" debts. There is no doubt

(1) (1905) App. Cas., p. 373.

that the Raja was anxious for the payment of his subsequent debts, and it is probable that had the trustee not fallen in with his views on that matter he would not so readily have lent his aid to the loan: on this point Mr. Sundara Ayyar tendered certain documents (the list is given in Civil Miscellaneous Petition No. 795 of 1903 on the record) which the Subordinate Judge declined to admit in evidence. We have admitted them (Nos. 2 to 7 and A and B in the list) as showing that the Raja was throughout this period scheming to procure the payment of his post-settlement debts out of the trust estate, but we do not think they make any difference to the result. The trustee did not try to make a reasonable bargain. It can hardly be doubted that if he had approached the Raja fortified with the opinion of Sir Bhashyam Ayyangar he could have saved the estate if not the whole charge of 4 lakhs of rupees, at any rate a great deal of it. The bargain which he did make can be deemed reasonable, if at all, only in the view that the Raja would not in spite of the legal opinion have yielded his consent on any other terms and that the English contractors would have thrown up the loan if his consent had not been obtainable. These things are not proved and were not tested by the trustee and the bargain cannot therefore be held to be a reasonable one or one which the Court can uphold.

We now proceed to deal with certain propositions advanced by Mr. Sundara Ayyar for the appellant which if they are sound would settle the appeal in his favour.

The first is that whether or not the agreement Exhibit XLIX and the mortgages Exhibits LXXXII and LXXXIII can be upheld as a provident and reasonable exercise of the powers of the trustee, the appellant, first defendant, is safe because he acted in good faith.

The cases cited in support of this contention do not suffice to establish it. No doubt where a sale by a trustee to another person does not itself amount to a breach of trust by the trustee and the breach of trust is committed in respect of the application of the purchase money, the transferee who pays his money *bonâ fide* without notice that a breach of trust is in contemplation is absolved from liability to lose the estate he has acquired. But no case to which we have been referred goes, we think, so far as to decide that the transferee is to be absolved merely because in his

opinion (he having full notice of the trust) the transaction is prudent and beneficial to the *cestui que trust*. The appellant had beyond any doubt full notice of the trust in this case, and it seems to us impossible to uphold a contention that because he honestly believed that he was giving good value for a mortgage which the trustee was empowered to effect, he is absolved, and entitled to retain his mortgage, however improvident the transaction may be found to be in reality. Having notice of the trust he has notice that the trustee must act reasonably and prudently. See *Keating* v. *Keating*(1). Here moreover we have nothing to support the view that the appellant really believed that the bargain he was making was a satisfactory one from the point of view of the estate. He has not gone into the box to say that that was his view, and the extent of his *bona fides* is, as pointed out by the Subordinate Judge, comprised in this that he took the mortgages with a view of getting good security for his money, and not with any desire to cheat any one else.

That is we think not enough; and *Corser* v. *Cartwright*(2), the case on which Mr. Sundara Ayyar chiefly relied is not an authority against this view.

The next proposition is this. Even if the provision to pay Rs. 4,00,000 cannot be supported still the mortgages Exhibits LXXXII and LXXXIII and the agreement XLIX in pursuance of which the mortgages were executed are supported by sufficient consideration to warrant the trustee in effecting them.

Practically, we have been asked to decide Original Suit No. 60 of 1897 and to hold that had that suit been tried out the settlement Exhibit I might have been set aside as intended to defeat or delay the unsecured creditors of the Raja, and Mr. Sundara Ayyar places his chief reliance on *Freeman* v. *Pope*(3), and the cases which have followed it, which adopt the view that when the effect of a voluntary settlement is necessarily to delay a creditor the intention will be presumed.

We do not know whether if there had been no question of paying the Raja's post-settlement debts to the amount of 4 lakhs, the trustee would have entered into the agreement XLIX, nor do we know whether the co-adjutor Chentsal Rao or the legal adviser

(1) (1835) 46 R.R., 178. (2) (1875) L.R., 7 H.L., 731.
(3) (1870) 5 Ch., App. 538.

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Sir Bhashyam Ayyangar would have approved a compromise on those terms. What was done and what was approved by them though apparently without any great enthusiasm (*vide* Exhibit WW. and Diwan's explanation thereof) was the making of an agreement to secure to the first defendant a debt which the estate was bound by the settlement to pay him, but which was then unsecured, and further to secure a post-settlement debt which the estate was not bound to pay, but which the trustee undertook to pay out of the sum of 4 lakhs owed to the Raja by the estate. The evidence of the trustee (page 832) shews that the agreement Exhibit XXXV weighed very much with him in the matter. He thought, he says, that the estate would be in no way prejudiced because the payment would come out of the 4 lakhs. We do not find in his deposition anything to suggest that he would have deemed himself justified in compromising the suit on the terms of Exhibit XLIX, had there been no debt owed by the estate to the Raja. And had we come to the conclusion that Exhibit XXXV was binding on the estate, we should have perhaps found more difficulty in refusing to accede to the argument that the compromise was a fair and reasonable one.

We cannot go quite so far as Mr. Krishnasamier would have led us and hold that the suit (Original Suit No. 60 of 1897) was certain to fail or certainly not *bonâ fide*. But in our view it was not very likely to succeed, and though it might have been right in the circumstances to buy off the first defendant, it was certainly not right to do so at the price of Exhibit XLIX and the mortgages which followed on it. The settlement Exhibit I provided for the payment of all debts due at its date (paragraphs 23–5), it was made subject to all debts then valid and binding (paragraph 6), and the Raja retained for himself only a maintenance allowance. It was a transaction to which the assent of the creditors would probably have been easily obtained, for it saved the estate from being further wasted by the Raja whose evidence shows that he was dissipating his property with considerable rapidity. But the deed was not expressed to create a trust for creditors, nor was the payment of creditors stated as a primary object of the settlement: on the contrary it was stated to be for the benefit of the Raja's son and other members of the family, and creditors who were not secured by mortgages might have had to wait for payment longer than they would have had to do had they been at liberty at once

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to attach the Zamindari on a decree obtained in a suit against the Raja. At the same time it is very difficult to say that the settlement *necessarily* delayed the unsecured creditors, and even if *Freeman* v. *Pope*(1) can be followed without reserve (as to which *vide Ex parte Mercer. In re Wise*(2)), it seems to us that the first defendant and his father had small chance of convincing the Court that the settlement was intended to delay them. There was however a chance of it, and there were other matters to be considered. Mr. Krishnasamier invited us in this connection to admit in evidence certain documents Exhibits L to U excluding Q which were refused admission by the Subordinate Judge. We have admitted them all, including Q at the instance of Mr. Sundara Ayyar, as throwing light on the circumstances surrounding the execution of the settlement deed and so on the settler's intention, but they do not materially help the plaintiff. On the contrary they show that the Raja's primary object was to preserve the estate rather than to pay his debts but they do not disclose any intention to defeat his creditors. The first defendant's suit undoubtedly stood in the way of the loan which was under negotiation for the payment of the debts scheduled in the deed of settlement, and the Raja was so anxious to save himself from the consequences of his post-settlement extravagance that it was somewhat doubtful what attitude he might assume. He had however given his evidence before the trustee was finally committed to a compromise (see Exhibit QQQ, 4th-7th November 1898 and Exhibit XLIX 16th January 1899, and he could do but little against the interests of the estate in that matter, and though it is easy to conjecture that the contractors in England would have hesitated to advance money to the trustee while his title was in litigation, the trustee clearly ought to have ascertained their views before compromising a suit in which his success was most probable, when the compromise entailed so heavy a burden on the estate as the mortgage Exhibit LXXXIII and the other payments agreed to in Exhibit XLIX and there were other matters to be considered on the other side of the question. The first defendant's father and the first defendant had since the settlement continued to lend money to the Raja on such security as remained to him, and before their suit was launched in November 1897 negotiations

(1) (1870) 5 Ch., App. 538. (2) (1886) 17 Q.B.D., 290.

were in progress for a loan which if obtained would enable the unsecured creditors to obtain payment of their pre-settlement debts earlier than they would have been able to obtain it in all probability had they been left to their remedies against the Raja and the Zamindari. These facts suggest that the suit was not a *bonâ fide* attempt to obtain a remedy for a grievance, but rather an attempt to force a compromise and obtain concessions from the trustee.

Further, although the first defendant was not a party to the deed of settlement of July 1895, there is a good deal of evidence to show that he acquiesced in, and took the benefit of, the deed, and was therefore precluded from impeaching its validity. The evidence would seem to establish that the deed of 1895 came into existence with the consent of the first defendant's father (see the Raja's evidence on page 707 and his evidence in deposition Exhibit QQQ, p. 830), that the first defendant received payment of interest on Rs. 1,30,000 (see Exhibit B) from the trustee out of the allowances which the trustee had to pay to the Raja and that he took bonds from the Raja on the footing of the trust, the Raja promising to pay out of the allowances provided for in the trust deed, and that he paid rent to the trustee in respect of leases to him by the Raja. See Exhibits B, E, F series, G, H, J, LXVI, LXVII and LXVIII. The evidence also shows some grounds for the suggestion that with regard to Original Suit No. 60 of 1897 the trustee was unwilling to go into the box (see Exhibits VV and WW and the evidence in connection with the application to examine the trustee on commission) and that he was unduly influenced by this consideration in compromising the suit. An elaborate argument took place upon the question whether the compromise was bad on the ground it had not been sanctioned by the Court. We do not propose to discuss this question as we are prepared to assume, for the purposes of this case, that the sanction of the Court was not necessary.

The remaining facts put forward as proving consideration for the compromise are the release of the first defendant's lien on some furniture, which had been purchased from the Raja by the trustee, and the transfer to the trustee of a lien held by the first defendant on some jewellery belonging to the Raja and on the Raja's allowances.

Assuming that the trustee had any right to buy the furniture for the estate with the lien on it, the release of the lien would not

go far as valuable consideration for the mortgage LXXXIII, and, moreover, the release is really illusory for by LXXXIII the securities were not to be transferred until Rs. 1,25,000 were paid up. The first defendant thus obtained temporarily double security both in regard to the furniture and the jewellery: the charge on the allowances alone was to be released on payment of Rs. 50,000 and the execution of the mortgage.

The charge on the allowances which of course would be valueless after the Raja's death, was not a security in which the trustee was entitled to invest the money of the estate and the jewellery was not in the possession of the trustee and therefore, whatever its value, formed a risky security to exchange for a mortgage, even a third or fourth mortgage, of the whole of the Ramnad Zamindari and the trustee does not seem to have done much to satisfy himself as to the value of this jewellery: "the Raja and some others" he says "were telling me that it was worth two lakhs" (p. 777)—but he does not say that he even ascertained that the pledgee Annamalai Chetty who held the property for a debt of Rs. 65,000, was still in possession of the whole of it.

These very risky securities are obviously not adequate consideration for the mortgage LXXXIII, and even adding to them the withdrawal of the suit we cannot think that the Court would uphold a compromise showing so great a risk and so small a benefit to the *cestui que trust*.

Also it seems to us that exhibit XLIX could not operate as an assignment of the Raja's rights (if any) under exhibit XXV. The Raja's rights were correlative to the obligation undertaken by him to obtain the consent of the allowance-holders to the postponement of the allowances. The assignment would only be good if the correlative obligation had been discharged. This obligation was not discharged. Further, the trustee, by transferring the liability of the estate to the Raja to the first defendant gave up all rights of set off which he had against the Raja in respect of the Raja's liability to the estate.

Moreover, the benefits which it was suggested the estate derived under exhibit XLIX were, for reasons which have been stated, if not illusory, altogether disproportionate to the obligation incurred. The validity of exhibit XLIX depends on the validity of exhibit XXXV and we have no doubt that that agreement

must be declared an improvident transaction not binding on the plaintiff. Mr. Sundara Ayyar asks us to throw on the plaintiff the burden of proving that this transaction is a breach of trust, and, in support of this contention, has relied on *Hire Purchase Furnishing Co.* v. *Richens*(1) and *Re Henson*(2). But neither of these cases is in point. In the former all that is laid down is that the law will not presume illegality when the facts connected with the transaction impugned are equally consistent with legality—and from the latter it may be gathered that it will be presumed that a devisee who is also an executor is acting in accordance with his duty when he sells, to pay legacies, property charged by the will with the payment of debts and legacies.

It is clear to us that if a transaction of this kind is impugned, a transaction which *primâ facie* throws a heavy burden on the estate for no apparently commensurate benefit, it will lie on the trustee to show that there is a real benefit to the beneficiaries. Mr. Krishnasamier has cited a string of cases in support of this view, but we think the matter is too plain to require the discussion of authorities, and the first defendant having complete notice of the trust must show, as against the beneficiary, that the transaction is one which the Court can uphold.

The question is really perhaps of no great importance, for the evidence, in our opinion, establishes affirmatively the fact that the agreement was improvident in the circumstances of the case.

The question so far considered forms the subject of issues Nos. 7 and 8 in the suit and we shall now briefly deal with the remaining issues.

On the first issue no argument was addressed to us, and there is no apparent reason to differ from the view of the Subordinate Judge. On the second issue, the decision of the Subordinate Judge that the plaintiff can sue alone seems to us to be right. If the other allowance-holders are beneficiaries under the trust deed their interest in the zamindari is at most that of charge-holders, and if, as Mr. Sundara Ayyar contends, they have a charge on the property it does not greatly matter to them whether a subsequent mortgage is or is not set aside. However that be, there seems to be no good reason why the plaintiff who is sole beneficial owner of the corpus of the trust property should not sue to protect it,

(1) (1887) 20 Q.B.D., 387. (2) (1908) 2 Ch., 356.

and Mr. Sundara Ayyar has cited no authority touching the question against those to which the Subordinate Judge refers in paragraph 15 of his judgment.

The third issue was not pressed; and on the fourth issue Mr. Sundara Ayyar did not make any attempt to show that the view of the Subordinate Judge is wrong.

As regards the fifth issue—Mr. Sundara Ayyar's contention is that one defendant cannot be ordered to pay money to another. But unless it is established that the plaintiff can get no relief unless he seeks to remove the trustee and procure the appointment of another we can see no principle on which he ought to be held disentitled to a decree that the money due to the trust be paid over to the trustee. The authorities cited, (*Giyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran*(1) and *Strinivasa Aiyangar* v. *Strinivasa Swami*(2)) differ from the present case in that the person to whom the property was by the decree directed to be delivered was not a defendant but some one substituted for the defendant. So in the cases of *Booth* v. *A'Beckett*(3) and *Rae* v. *Meek*(4) there is the same difference. But there is no authority cited to us to support the view that the suit must be for the removal of the trustee. *Padmanabha Chettiar* v. *Williams*(5) was referred to but that does not decide that the discharge of the trustees is a necessary object in a suit instituted for the protection of the estate against a breach of trust. There may easily be cases where a trustee had made a mistake and yet it may be unnecessary to remove him from his office: a difficulty might no doubt arise if the trustee to whom payment is ordered declined to execute the decree: in that event it might be necessary to remove him, but that event has not occurred in the present case. We are unable to hold that the decree of the Subordinate Judge is wrong in directing payment to the trustee. Here, too, we may remark that the present trustee to whom payment will now have to be made is not the man responsible for the breach of trust, but his successor, and there can be no objection to payment to him; but even as matters stood at the date of the Subordinate Judge's

(1) (1886) I.L.R., 10 Mad., 375 at p. 508.
(2) (1893) I.L.R., 16 Mad., 31 at p. 33.
(3) (1863) 15 E.R., 676. (4) (1889) 14 A.C., 558.
(5) (1900) I.L.R., 23 Mad., 239 at p. 253.

decree we do not think there was anything improper in the direction in question.

On the sixth issue we have heard a great deal of argument, but in view of our decision on the seventh issue it is really unnecessary to decide the questions raised; it seems to us at least doubtful whether the trustee had power to compromise at the expense of the trust estate a suit in which his own position as trustee was attacked—vide *Graham* v. *M. Cashin*(1) and cases cited therein at p. 412 of the report—and if he had not, the mortgages will not bind the beneficiaries. It is not, however, necessary to decide this point.

For the reason we have stated it is not necessary to express an opinion upon the ninth issue on which the Subordinate Judge has found that in the absence of a sanction of the Court under section 462 of the Civil Procedure Code of 1882, the compromise of Original Suit No. 60 of 1897 is voidable by the plaintiff.

The finding on the tenth issue is not contested by Mr. Sundara Ayyar but forms the object of attack in the plaintiff's memorandum of objections: according to the trustee's evidence (p. 835) his payments to the first defendant amounted to Rs. 41,092-11-7 and not to Rs. 39,087-8-4 as in the decree (p. 851). Exhibits LIX—LIX (m) (pp. 543 *et seq*) are vouchers for the payment alleged.

We must allow the memorandum of objections.

As to the eleventh issue the contention on behalf of the first defendant on this issue is to the effect that he is not bound to restore to the trust estate the sums paid to him by the trustee under the invalid contracts—payments under the covenant in XLIX—to pay Rs. 20,000 and payments under the mortgage LXXXII.

Mr. Sundara Ayyar relied on *In re Barney*(2) and contended that the money was not part of the trust estate which the beneficiary can follow. But that was not a case in which the trustee paid out a debt which the estate was not bound to pay. In that case Mrs. Barney carried on a trade which was not authorized by the will under which she was a trustee, and one Mitchell who assisted her in the business, with notice of the trust was held not to be a trustee for sums of money paid to him by her for goods supplied for the purposes of the trade at the market rates.

(1) (1901) 1 Ir. R., 404.

(2) (1892) 2 Ch., 265.

Here we have found that the first defendant gave no adequate consideration for the encumbrance in pursuance of which the money was paid out to him, and on that ground alone the cases are distinguishable. Ours is a case in which trust money has by a breach of trust come into the hands of the first defendant, and the beneficiary can follow it if he desires so to do (*Smith* v. *Patrick*(1)).

No argument was addressed to us on the twelfth and thirteenth or fourteenth issues.

On the fifteenth and sixteenth issues it is not necessary for us to pronounce an opinion, (1) whether the deviation in respect of the payment of 4 lakhs from the agreement (exhibit XXXV) would invalidate the mortgages, or (2) whether differences between the mortgages and the agreement XLIX would have that effect?

These are all the issues framed in the case, and we do not find one on which to found the contention advanced on behalf of the first defendant that whatever may be our views as to the compromise under which Original Suit No. 60 of 1897 was withdrawn, we cannot now set aside the agreement because it is impossible to reopen the suit. This question has been discussed very briefly by the Subordinate Judge in his consideration of the ninth issue but is not really covered by that issue.

Nor is it one of many grounds of appeal that the Subordinate Judge's decree ought, if it set aside the compromise, to have directed the restoration of the suit to the file. In the forty-sixth ground the contention is only that the compromise ought not to have been set aside because the parties cannot be restored.

The Subordinate Judge's decree declares that the mortgages are not binding on the plaintiff and that declaration we believe to be correct; it says nothing about Original Suit No. 60 of 1897, and we are not asked in the memorandum of appeal to make any addition to it.

Our decree, therefore, should not contain any direction with reference to the suit. All that we need consider is whether in the events that have happened the agreement XLIX and the consequent mortgages can be declared invalid as against the plaintiff, seeing that part of the consideration for them was the withdrawal of the suit.

(1) (1901) A.C., 284.

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We see no good reason why we should be deterred from declaring the mortgages invalid merely because the first defendant since the withdrawal of the suit has received payment of his debt and because the trustee Venkata Rangier is dead.

We dismiss the appeal with costs and allow the memorandum of objections with costs.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1906. March 16, 22, 31.

KANAKKU NAGALINGA NAIK (FIRST DEFENDANT), APPELLANT,

v.

NAGALINGA NAIK AND OTHERS (PLAINTIFFS AND DEFENDANTS NOS. 2 TO 8), RESPONDENTS.*

Civil Procedure Code, Act XIV of 1882, s. 522—No appeal from a decree on an award except on the grounds mentioned in the section.

Under section 522 of the Code of Civil Procedure of 1882, no appeal lies against a decree passed in accordance with an award, except on the grounds stated in the section. No appeal will lie on the ground that the award is void *ab initio*.

Chairman of the Purnea Municipality v. *Siva Sankar Row*, [(1906) I.L.R., 33 Calc., 899], followed.

Indur Subbarami Reddy v. *Kandadai Rajamannar Ayyangar*, [(1903) I.L.R., 26 Mad., 47], not followed.

APPEAL against the decree of W. Gopalachariar, Subordinate Judge of Madura (East), in Original Suit No. 54 of 1903.

The first defendant appealed to the High Court.

T. V. Seshagiri Ayyar for appellant.

P. R. Sundara Ayyar and *K. Ramachandra Ayyar* for first respondent.

JUDGMENT.—The plaintiff brought a suit for partition. At the request of the parties the matter was referred to arbitration. An award was submitted and the Subordinate Judge, with slight modifications, passed a decree in terms of the award under section 522, Civil Procedure Code. The first defendant appeals,

* Appeal No. 31 of 1906.

MUNRO AND ABDUR RAHIM, JJ.

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and the grounds of appeal pressed are that the award is void *ab initio* because notice was not given to one of the arbitrators, and invalid because signed by only one of the arbitrators.

The preliminary objection is taken that under section 522, Civil Procedure Code, no appeal lies from the decree of the Subordinate Judge except in so far as the decree is in excess of, or not in accordance with, the award, and that as no such ground is pressed the appeal must be dismissed. The case of *Chairman of the Purnea Municipality* v. *Siva Sankar Row*(1), supports this objection, and we agree with that decision which is based upon the ruling of the Judicial Committee of the Privy Council in *Ghulam Khan* v. *Muhammad Hassan*(2). It is suggested that the ruling of the Privy Council has been misunderstood and does not bar an appeal where it is alleged that there is no valid award or that the award is void *ab initio*. The appeal before the Privy Council was against the decision of the Full Bench of the Chief Court of the Punjab. In the judgment of the Full Bench which is printed *in extenso* in the report, it was distinctly held that, although "under the Code of 1859 it was competent to a party to object by way of appeal that what purported to be an award was no award, or had no legal existence as an award *ab initio*," under the Code of 1882 such objections could not be taken. Referring to this judgment Their Lordships of the Privy Council observe at p. 185 that they entirely concur in the decision that no appeal lay. From this we think it is clear that the decision of the Privy Council has been correctly interpreted in the case of *Chairman of the Purnea Municipality* v. *Siva Sankar Row*(1). *In Indur Subbarami Reddy* v. *Kandadai Rajamannar Ayyangar*(3) it was held that an appeal lay on the ground that the award was void notwithstanding that the decree was in accordance with what purported to be an award. The decision in *Ghulam Khan* v. *Muhammad Hassan*(2) was not however referred to, and was probably not brought to notice as it was passed only two months before the hearing. Holding therefore that no appeal lies in this case we dismiss the appeal with costs.

(1) (1906) I.L.R., 33 Calc., 899. (2) (1902) I.L.R., 29 Calc., 167.
(3) (1903) I.L.R., 26 Mad., 47.

APPELLATE CIVIL.

Before Sir Arnold White, Chief Justice, and Mr. Justice Sankaran-Nair.

1908. March 30, 31. April 1, 7, 31.

S. AUTHIKESAVULU CHETTY (PLAINTIFF), APPELLANT,

v.

S. RAMANUJAM CHETTY AND ANOTHER (DEFENDANTS), RESPONDENTS.*

Hindu Law—Succession, woman's estate—Form of marriage, proof of—Brahma and Asura marriages, essentials of.

A married woman of the Kavarai caste (Sudra) having died issueless, the question arose between the husband and the parents of the deceased as to who was entitled to succeed to her property. The evidence showed that at the marriage of the deceased woman, the Vivaha homam and the sapthapathi were not performed and it was argued for the parents, that in the absence of these ceremonies the marriage was not in the Brahma but the Asura form, and that the parents and not the husband were entitled to succeed to the property. The evidence also showed that in that community it was not customary to perform these ceremonies. It was also proved that the jewels given to the bride were given as presents to her, and not as bride-price, and that the father when giving his daughter decked with jewels, pronounced the sloka, appropriate to the Brahma and Daiva forms of marriage:

Held, that, according to Hindu Law, it must be presumed in the absence of evidence to the contrary that a marriage was in the Brahma form. Such a presumption cannot be made when it is shown that a certain community have till recently been following the Asura form of marriage, though in this case the Court will not presume that the marriage was in the 'Asura' form.

The 'Asura' form of marriage is not approved even for the 'Sudra' classes.

The distinctive mark of the Asura form is the payment of money for the bride, as the absence of such payment is of the approved forms.

The offerings and ceremonies necessary to constitute a valid marriage are the same in the Brahma and the three other approved forms and in the Asura form:

Held further, the non-performance of the *homam* and *sapthapathi* may [illegible] be relied upon to show there was no valid marriage where they form, [illegible] or without others, a criterion of the intention to enter into the contract of marriage, but it cannot be relied upon to prove that the marriage was in any [illegible] form.

The customary payment of a trifling sum of money known as Payidimudupu cannot be regarded as bride-price:

Held, on the facts stated above, that this was a Brahma marriage and therefore that the husband was the heir of his wife.

* Original Side Appeal No. 34 of 1908.

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S. AUTHIKESAVULU CHETTY *v.* S. RAMANUJAM CHETTY.

ORIGINAL SIDE Appeal from the judgment of Boddam, J., dated the 13th day of February 1908, in Civil Suit No. 177 of 1906.

K. Narayana Rao and *P. Doraiswami Ayyangar* for appellant.

P. R. Sundara Ayyar for first respondent.

L. A. Govindaraghava Ayyar and *C. P. Ramaswami Ayyar* for respondents.

JUDGMENT.—The suit is brought by the plaintiff, appellant, to recover the stridhanam properties left by his wife who died without any issue. They are alleged to have been given to her at the time of marriage before the nuptial fire and during the bridal procession. The plaintiff claims to be the heir as the marriage was in the 'Brahma' form. The first defendant the father, and the second defendant the mother of the deceased, contend that the marriage was in the 'Asura' form and that, therefore, they are the heirs. Besides denying the right of the plaintiff to recover any properties in their possession they advance a counterclaim to recover some jewels of the deceased in the possession of the plaintiff. The learned Judge has held that the 'marriage' was in the 'Asura' form and dismissed the suit. This is an appeal from that decision. It is not disputed that if the marriage was in the 'Brahma' form, the plaintiff is the heir, and if it is in the 'Asura' form one of the defendants, and not the plaintiff, would be entitled to the stridhanam left by the deceased.

The important question, therefore, for consideration is whether the plaintiff was married to his deceased wife in the 'Brahma' form. The parties are at issue and the evidence is conflicting as to the ceremonies performed at the plaintiff's marriage.

It is admitted that on 25th August 1904 took place what appears to be the ceremony of betrothal or *vagdanam* called by the witnesses Payidimudupu. On that day some married woman of the caste to which the parties belonged proceeded from the bridegroom's house to the house of the bride carrying certain presents consisting of cocoanuts, betel and nut, garlands, black-beads, saffron, red powder, etc., in a tray. There were also a pagoda and a fanam in it. The arrangement as to expenses and gifts was formally entered into and announced. According to the plaintiff's evidence his father said he was going to give a hundred pagoda worth of jewels, that is, Rs. 350, and the father of the bride, the first defendant, said he was going to give jewels of the value of not less than Rs. 5,000, and he was going to give jewels to the bridegroom also.

According to the Purohit, defence first witness, the bridegroom's people promised Rs. 300 worth of property and the bride's people promised Rs. 5,000 worth of property. After this the bride's party said, according to the Purohit, we give the girl to you and the bridegroom's people said we take her. Then after certain ceremonies, the black-beads were tied round the bride's neck and all the articles in the tray with the exception of the pagoda and fanam were tied in the girl's waist. As to what was done with the pagoda and the fanam there is direct conflict of evidence. According to the plaintiff's evidence this pagoda and fanam were tied in a piece of cloth smeared over with saffron and with the cocoanut was placed in the waist-cloth of the bride. Some witnesses say it was so tied in the name of Venkateswar, the God of the Tirupati temple, and the pagoda and the fanam were according to custom afterwards sent to the temple. Other witnesses say that nobody cares what becomes of it after it is given to the bride. This is intended to rebut the defence evidence that this is the purchase money, in consideration of which the marriage took place. According to the defendants the pagoda and the fanam were given to the bride's mother, the second defendant. The purohit swears he took them out of the tray and delivered them to the mother himself. According to him "ancients say this money was given as cooly to the mother for suckling." The defendants rely upon this to show that this is really the consideration money paid by the bridegroom for the purchase of the bride, or at any rate, it represents what of old was really the purchase money, and that the marriage must therefore be held to be in the 'Asura' form.

Then, on the 29th August, the marriage ceremonies customary among the class to which the parties belong were performed. As the fact of marriage and its validity in law are admitted, it is not necessary to describe them. There was the gift of the bride decked with jewels admittedly worth more than Rs. 5,000 by the defendants to the plaintiff bridegroom and there was also Panigrahanam. But according to the Purohit and the other defence witnesses, there was no Vivaha homam, and no Sapthapathi. It is not contended that the absence of these ceremonies invalidates the marriage, as it is conceded that these are not customary ceremonies among the community to which the parties belong and that they are not therefore performed. But it is contended that,

according to Hindu Law, they are essential in the case of 'Brahma' marriage. According to the plaintiff's evidence homam was performed, but it appears to have been Navagraha homam and not Vivaha homam. We have not been referred to any evidence to show that Sapthapathi formed a part of the marriage ceremony, and we must therefore accept the evidence of the Purohit who is also corroborated by other witnesses that it is not customary among this community to perform Vivaha homam or Sapthapathi and they were not performed in this case. The plaintiff also swears that at the time of the marriage his father told the first defendant that only such of the jewels as the latter intended as a gift to the bride should be on her person and that the rest should be removed to which he replied "not once but thrice" that all the jewels that were then on the person of the bride which are worth much more than Rs. 5,000 except the head ornaments were intended to be given as presents. This is denied by the defendants; and though the plaintiff is supported by some witnesses, we are not prepared to accept their testimony which has not been believed by the learned Judge.

On behalf of the appellant, plaintiff, it is contended that there is a presumption that a Hindu marriage is not in the Asura form but Brahma, that the evidence in this case shows that there was no 'bride-price' paid; but that the father gave his daughter to the bridegroom decked with jewels and that the sloka recited at the ceremony also shows that it was a Brahma marriage. On the the other hand, Mr. Sundara Ayyar contends that the Brahma marriage is primarily intended for Brahmans, though, no doubt, the other castes including the Sudras may have adopted it in some instances; that the Balijas or Kaverais, the castes to which the parties belong, perform their marriages in the Asura form; that the admitted fact that they still retain the ceremony of a gift of a pagoda and a fanam shows that the Asura form has not been discarded by them; and that the omission of Vivaha homam and Sapthapathi shows that even if the marriage is not Asura, it cannot be Brahma.

There is no doubt that, according to Hindu Law, the presumption is in favour of Brahma marriage. The Asura marriage is not approved and is considered a base form of marriage. Though it is allowed in the case of Sudras, Manu says it ought not to be practised even by them. (Manu III, 51 and IX, 98.) The

Courts have accordingly held that, in the absence of any proof to the contrary, the marriage must be presumed to be in one of the approved forms (see *Gojabai* v. *Shrimant Shahaji Rao Mealoji Raje Bhosle*(1), *Jagannath Prasad Gupta* v. *Runjit Singh*(2), *Thayammal* v. *Annamalai Mudali*(3)) ; and as the other approved forms are unusual, and it is not stated that the marriage is in one of those forms, the presumption is that the marriage is in the Brahma form. But it is clear that the Asura form till recently, at any rate, was very common in Southern India (see I 'Strange's Hindu Law,' page 43), and Leon Sorg states that the marriage by purchase is the common form among the Tamils and when money is paid to the father of the bride the formula is repeated, "The money is for you, the girl is for me." He also states that the Kaverais, to which caste the parties belong, marry according to the Asura form.

This undoubtedly shows that the presumption of Hindu Law must be applied only with some caution to marriages among these castes. It is not contended that these castes, even if Sudras which is not admitted are not entitled to marry in the Brahma form. The words in Manu's text "to a man learned in the Veda" (Manu III, 27), a qualification which, however, is not found in Yagnavalkya, shows no doubt that the marriage was originally intended according to Manu for the Brahmans or the twice-born classes. But the other classes must have adopted it in the days of the commentators, as we find Kullaka Bhatta, Sarvagna Narayana Raghavananda and also others explain this to mean a person who follows the "achara," that is the usage of his class. It cannot be denied that any class or person may marry in the Brahma form ; and we cannot ignore the tendency shown by the lower castes to imitate the higher castes in their ceremonies and other observances. When therefore it is shown that a certain community have been following till recently the Asura form of marriage, it may be that the Court may not be justified in drawing any presumption that they have abandoned that form ; but we can neither draw any presumption, for these reasons, that the marriage is in the 'Asura form.' The case therefore has to be decided upon the evidence

(1) (1893) I.L.R., 17 Bom., p. 114 at page 117.
(2) (1898) I.L.R., 25 Calc., p. 354 at page 365.
(3) (1896) I.L.R., 19 Mad., 35.

given by the parties without the aid of any presumption in favour of either side.

The distinctive mark of the Asura marriage is the payment of money for the bride. It is certain that the payment of a pagoda and $2\frac{1}{2}$ annas was not intended as any consideration in this case where the bride's father spent thousands of rupees himself and gave presents of considerable value to the bride and the bridegroom. The payment was not made to the father the owner, in the eye of the Hindu Law, of his daughter, for transferring his rights over her but it was made to the mother. The caste tradition according to the Purohit and the defence evidence is, that this amount, fixed by the caste, is paid as 'Palu Kuli', milk cooly ; this does not support the theory that it is bride-price. It looks more like a compliment paid to the mother. Even where the father receives from the bridegroom, a cow and a bull and two pairs, it is treated as a marriage—Arsha—in an approved form, as it is not given as the price of the bride.

It will be observed the son of a wife wedded in the first three forms of marriage, the Brahma, Daiva and Prajapatya, liberates from sin, ten, seven and six ancestors and decendants respectively. The son of a wife married according to arsha rites liberates only three. It is a distinctive mark of these three forms of marriage that nothing is received by the bride's father; and according to Hindu Law, the Brahma form is honourably distinguished as the bride's father gives her decked her with jewels or honouring her by presents of jewels. According to some of the commentators of Manu, the father gives presents of jewels also to the bridegroom. In this case it is in fact admitted and clearly proved by the evidence on both sides that this was done. The Purohit also proves that at the time of the Panigrahanam he recited the sloka which implies that the desire to attain heaven prompted the gift of the virgin with wealth and decked with jewels. **कन्यां कनकसंपन्नां सर्वाभरणभूषितां दास्यामि विष्णवे तुभ्यं ब्रह्मलोकजिगीषया.** This is peculiarly appropriate to the Brahma and Daiva forms of marriage. It is repugnant to an Asura marriage which is condemned and not carried out to attain heaven, and where the father does not give wealth or jewels but the bridegroom pays the 'bride-price.'

The next contention is that even if it is not proved to be 'Asura,' the marriage cannot be held to be Brahma on account of

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the omission of Vivaha homam, the nuptial fire and the Sapthapathi. As already stated it is not contended that this omission renders the marriage invalid in law. It is admitted that the formalities and ceremonies customary in the community to constitute the relation of husband and wife have been complied with, and that they constitute a valid marriage, and the same evidence that proves that the ceremonies aforesaid were not performed also proves that so far as this caste is concerned they are unnecessary to indicate the intention of the parties to enter into a valid contract of marriage. Mr. Mayne is of opinion that we have now only Brahma and Asura forms of marriage though he notices a few instances of Gandharva marriage also. Mr. Justice Bannerjee observes in his book on "Marriage and Stridhan" "Of the four approved forms of marriage, the Brahma is the only one that now prevails, and all persons, even Sudras, are at the present day held competent to marry in that form. Of the four base forms, the Asura is the one that is now prevalent, and is, in fact, the most common form of marriage, and Gandarbha marriages also sometimes take place." The marriage in this case is of course not in the Gandharva form and if it is not in the Asura form, if these learned authors are right, it must be a Brahma marriage. Such is also the view of the learned Judges in *Sivarama Casia Pillai* v. *Bagavan Pillay*(1).

Assuming, however, that there are various forms of marriage now prevalent, does the omission of the Vivaha homam and the Sapthapathi show that the marriage in question cannot be in the Brahma or any other approved form. Mr. Sundara Aiyar contends that it is not necessary for him to show that the marriage was in the Asura or in an unapproved form; there may exist others besides the eight forms.

The Hindu Law books, Smritis, describe the eight forms of marriage among Hindus: and the rules of succession are based upon these eight forms of marriage only. The rule of inheritance is based upon the following test of Yagnavalkya :—

"The property of a childless woman married in one of the four forms denominated Brahma, etc., goes to her husband; but if she leave progeny, it will go to her (daughter's) daughters; and in other forms of marriage (as the Asura, etc.,) it goes to her father

(1) (1859) Mad. Sud. Rep., 44.

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(and mother on failure of her own issue)." The other forms of marriage as the Asura are evidently the four unapproved forms described in the earlier part of the Smriti.

Vignaneswara in the Mitakshara enumerates them in his commentary on this sloka—

"Of a woman dying without issue, as before stated, and who had become a wife by any of the four modes of marriage denominated Brahma, Daiva, Arsha, Prajapatya, the property as before described belongs, in the first place, to her husband. On failure of him it goes to his nearest Sapindas. But in the other forms of marriage, called Asura, Gandharva, Rakshasa and Paisacha the property of a childless woman goes to her parents". Mitakshara, Chap. II, section XIII.

Thus for purposes of succession to stridhanam property, the Hindu Law recognises only these eight forms of marriage, and when a valid marriage has been proved to have been contracted according to the customary rites, then to decide the question of inheritance we have to determine to which of these eight classes it belongs. Can it then be said that there are any ceremonies that are characteristic of the Brahma or approved form as distinguished from the Asura form, so that their presence or absence as a customary formality or ceremony would indicate the class to which it belongs?

Commentators are divided as to the necessity of the prescribed offerings and wedding ceremonies in the case of Gandharva, Rakshasa and Paisacha marriages, sacred books of the East, Vol. 25, p. 81, footnote to sloka 32. Therefore, apparently they entertain no doubt that there is no difference in the ceremonies as to the other marriages. We have already held that among those classes who recognise *homam* as essential to a valid marriage, its performance is necessary to constitute the relation of husband and wife: even in Gandharva marriage, Sapthapathi follows homam. This also assumes that among the five forms including Brahma and Asura, all the ceremonies have to be performed (*Brindavana* v. *Radhamani*(1)). Mr. Justice Bannerjee in his work "Hindu Law of Marriage and Stridhan", p. 95, states, clearly, "At the present day, whether marriage is celebrated strictly according to the Brahma form, or whether a nuptial gratuity is taken by the

(1) (1889) I.L.R., 12 Mad., 72.

bride's family, the same rites are observed in all cases" or in other words, there are no distinctive ceremonies to distinguish the Brahma from the Asura form. The non-performance of the Homam and the Sapthapathi may thus be relied upon to show there was no valid marriage where they form, with or without others, the criterion of the intention to enter into the contract of marriage, but it cannot be relied upon to prove that the marriage was in any particular form.

Our conclusion is strongly supported by the judgment of the Bombay High Court in *Moosa Haji Joonas* v. *Haji Abdul Rahim*(2) where it was held that a marriage according to Muhammadan rites was an approved form of marriage under Hindu Law. It was found to be the highest form of union known to Cutchee Memmous who follow the Hindu Law and was free from all that was reprehensible. It was held that it was the quality and not the form of marriage that decides the course of devolution.

We are therefore of opinion that the plaintiff is the heir of his deceased wife.

The next question is what is the value of the property left by the deceased. According to the plaintiff all the jewels which were worn by the deceased on the day of her marriage were her property given to her by the first defendant and their value is given by the plaintiff and his paternal uncle, the second witness. The latter estimates it at about Rs. 15,000. The other witnesses do not give their value. The first defendant admits possession of jewels of the value of Rs. 5,428-9-0, and states, in his evidence, that the other jewels worn by the deceased were either family jewels or borrowed for the occasion. It is not uncommon to borrow jewels to be worn by the bride at the marriage and the first defendant's evidence is supported by the fact that at the Vagdonom ceremony according to the first defendant he promised to give jewels for Rs. 5,000 only and the plaintiff's paternal uncle is only able to say that the first defendant promised to give not less than Rs. 5,000. This renders incredible the plaintiff's evidence that he presented jewels worth nearly Rs. 15,000. We accordingly accept the first defendant's evidence on this point.

We disallow the plaintiff's claim to the gold chain claimed as he has failed to prove that he gave it to the first defendant for repair.

(1) (1906) I.L.R, 30 Bom., 197. (2) (1906) I.L.R., 30 Bom., 197.

As to the defendants' counter-claim, they are not entitled to recover as the heirs of their daughter as the marriage was in the Brahma form, and as to their allegation that they only gave some of the properties for the marriage ceremony and the others were intended to be taken back, it is not explained why they were not taken back before. Any property therefore allowed to remain with the plaintiff must be presumed to have been given to him. We accordingly disallow the counter-claim.

We set aside the decree of the learned Judge and give the plaintiff a decree for the recovery from the defendants of the jewels in schedule V of the first defendant's written statement or their value Rs. 5,428-9-0, with costs in both Courts on the above value of the jewels decreed.

The counter-claim is dismissed with costs in both Courts.

APPELLATE CIVIL.

Before Mr. Justice Miller and Mr. Justice Sankaran-Nair.

JANAKISETTY SOORYUDU *alias* SOORAYYA (PLAINTIFF), APPELLANT,

v.

MIRIYALA HANUMAYYA (DEFENDANT), RESPONDENT.*

1908. November 20. December 3. 1909. July 20.

Hindu Law—Stridhanam—Property inherited by maiden daughter, nature of interest taken in—Daughter takes only limited estate.

Inherited property is not *stridhanam*, and the case of a maiden daughter succeeding to the *stridhanam* property of her mother is no exception to this general rule. The maiden daughter so succeeding takes only a limited estate.

The inclusion by Vignaneswara of inherited property in the definition of stridhanam is not in accordance with other authorities and ought not to be accepted as law.

Virasangappa Shetti v. *Rudrappa Shetti*, [(1896) I.L.R., 19 Mad., 110], followed.

Venkatarama Krishna Rau v. *Bhujanga Rau*, [(1896) I.L.R., 19 Mad., 107], not followed.

Narasayya v. *Venkayya*, [(1893) 2 M.L.J., 149], not followed.

SECOND APPEAL against the decree of S. P. Rice, District Judge of Guntur, in Appeal Suit No. 56 of 1905, presented against the

* Second Appeal No. 369 of 1906.

decree of C. Ranganayakulu Naidu, District Munsif of Narasaraopet, in Original Suit No. 657 of 1904.

[This was a suit for the recovery of possession of land, house, etc.]

The plaintiff and one Chendrudu were undivided brothers. The latter died and his widow, Kotamma, claimed a provision for maintenance from the plaintiff. He accordingly executed a maintenance deed conveying thereby the suit property as well as some moveables. Kotamma died and her maiden daughter Lingamma inherited the suit property. Lingamma died after her marriage. The defendant, her husband, was at the time of suit in possession of the land and the plaintiff claimed it from him on the ground that after the death of Kotamma the property reverted to him as he was the donor and as it was intended for her maintenance.

The defendant denied the plaintiff's right to the suit land and contended that the deed executed by the plaintiff in favour of Kotamma vested an absolute estate in her with powers of alienation, and the land was not meant to revert to the donor as it was given away in full satisfaction of Kotamma's claim for maintenance under a special arrangement and not merely for the purpose of Kotamma's maintenance for life. The defendant also set up an oral will by the deceased Kotamma in favour of her daughter Lingamma and claimed the suit property as her husband and heir.

The material issues were—

Whether the suit land, which had been given to the defendant's mother-in-law with powers of disposition, can now be claimed by the plaintiff as the reversioner?

Whether the defendant's mother-in-law left the suit property to the defendant's wife by an oral will?

The District Munsif found the former issue against the plaintiff and dismissed the suit.

On appeal the decree was confirmed.

Plaintiff appealed to the High Court.

The main grounds of appeal were as follow—

1. The lower Appellate Court erred in holding that the property inherited by Lingamma became her absolute property.

2. The lower Appellate Court ought to have held that under the Hindu Law property inherited by a maiden stands on the same footing as property inherited by a married woman.

B. Sitarama Rau for appellant.

V. Ramesam for respondent.

JUDGMENT.—It was decided in the Court of First Instance that Kotamma took a heritable estate and not one limited for her life under the grant from her brother-in-law: this question though raised in the memorandum of Appeal was not argued before the District Judge. Argument was addressed to us on the question but we think the District Munsif's decision is right.

The remaining questions are (1) whether Lingamma inherited the property as her stridhanam, so that it passes on her death to her heirs? and (2) if she did not, whether the property became her stridhanam under the will of her mother Kotamma? The second of these questions has not yet been decided by either of the Courts below; the District Judge having held that Lingamma inherited the property as stridhanam if it came to her by inheritance did not find it necessary to consider the alleged will, and the District Munsif seems to have decided the suit solely on his finding as to the nature of Kotamma's estate.

On the first question the District Judge holds that the property was stridhanam in Lingamma's hands by reason of an exception to the general rule that property received by a woman by inheritance from a woman is not stridhanam in the former's hands.

This exception is in the case of a maiden daughter inheriting from her mother property which was her mother's stridhanam; and this is the present case. The District Judge supports his conclusion by the authority of *Narasayya* v. *Venkayya*(1) and *Venkatarama Krishna Rau* v. *Bhujanya Rau*(2), in which the former case is declared to form an exception to the general rule. But neither of these cases required for the decision of the question in dispute, the decision of this question.

In *Virasangappa Shetti* v. *Rudrappa Shetti*(3), however, this question did actually arise and was decided by Best and Subramania Aiyar, JJ., in accordance with the general rule and not as an exception. The case of *Narasayya* v. *Venkayya*(1) was brought to the notice of the learned Judges but they do not

(1) (1892) 2 M.L.J., 149. (2) (1896) I.L.R., 19 Mad., 107.
(3) (1896) I.L.R., 19 Mad., 110.

follow it: they accept the view which rejects "Vignanesvara's doctrine that the word '&c.' in the text of Yajnavalkya relating to what constitutes stridhanam includes property inherited"; they note that *Narasayya* v. *Venkayya*(1) was not followed in *Mullangi Ammanna* v. *China Kamiah*(2) in this Court; and in answer to the contention that that case is in accordance with the Mitakshara, they discuss the question and decide that the Mitakshara is not upon this point to be followed. According to this decision inherited property is not stridhanam. It was urged before us that the learned Judges must have overlooked Mitakshara, Chapter II, Section XI, 30 on which reliance is placed in *Narasayya* v. *Venkayya*(1) but we cannot think that that is so. The learned Judges proceed on the broad grounds that the inclusion by Vignanesvara of inherited property in the definition of stridhanam is not in accordance with other authorities, and cannot be accepted as the law now that the Courts, including the Privy Council have, except in Bombay, unanimously declined to follow him as to property inherited from a male.

Inherited property then is not stridhanam, and, if Vignanesvara is not to be followed when he defines stridhanam as including inherited property, what reason is there for holding that he should be followed when, in a passage a little later on in his commentary, he follows his own definition in considering the disposal of such property? There is no solid basis for the exception suggested; and the learned Judges in *Virasangappa Shetti* v. *Rudrappa Shetti*(3) the only case in this Court in which the question has actually required decision, refused to make any exception.

On the other hand, the learned Judges in *Venkataramakrishna Rau* v. *Bhujanga Rau*(4) which was decided after *Virasangappa Shetti* v. *Rudrappa Shetti*(3) and which refers to it clearly overlooked the fact that the latter case related to an unmarried daughter, when they say "the succession to a maiden daughter is the sole exception to the rule, and in all the other cases quoted, the question has been as to the succession to a married daughter" (page 110).

(1) (1892) 2 M.L.J., 149.
(2) Second Appeal No. 169 of 1893 (unreported).
(3) (1896) I.L.R., 19 Mad., 110. (4) (1896) I.L.R., 19 Mad., 107.

Following *Virasangappa Shetti* v. *Rudrappa Shetti*(1), we hold that Lingamma had only a limited estate in the property which came to her from Kotamma if she took it by inheritance, and must ask the District Judge for a finding on the third issue before we can dispose of the appeal. No oral evidence has been recorded in the Court of First Instance on any point, so we must allow evidence to be taken.

The finding should be submitted within six weeks, and seven days will be allowed for filing objections.

In accordance with the above order the District Judge submitted the following

FINDING.—I am directed by the High Court to try the following issue; "Whether the defendant's mother-in-law left the suit property to the defendant's wife by an oral will?"

2. The parties were permitted to adduce evidence on the issue. Defendant examined six witnesses. Plaintiff examined himself and two other witnesses. The evidence of plaintiff and his witnesses is untrustworthy. He asserts he executed Exhibit I in favour of Kotamma under coercion. I do not believe he ever cared much for her. His assertion that he was present at Kotamma's house throughout the day when the oral direction relied on by the defendant is alleged to have been made is incredible. He goes so far as to say that his wife had nursed Kotamma and that the latter's parents were practically indifferent in the matter. He and his witnesses state that Kotamma's male neighbours never called at her house when she was seriously ill on the day preceding her death and that the only males then present were themselves, who had admittedly lived far away from her house and were not really interested in her welfare. Plaintiff's witnesses Nos. 2 and 3 are closely related to him. I disbelieve the evidence adduced on plaintiff's side.

3. The next question is whether the evidence of defendant's witnesses establishes the truth of the oral will relied on by the defendant. All the defendant's witnesses were Kotamma's neighbours and they are also disinterested witnesses owning lands in the village. Defendant's first five witnesses state that Kotamma became very ill on the day previous to her death and told her father in their presence that all her property should go after her

(1) (1896) I.L.R., 19 Mad., 110.

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death to her only daughter and that the latter should be given in marriage to her younger brother, the defendant herein. Defendant's sixth witness states that Kotamma said that her estate should go to her younger brother and daughter and that her daughter should be married to that brother. The witness states that Kotamma died about ten days after making that declaration. But the evidence on both sides shows that she died after a short illness and the defendant's sixth witness himself states that he went into the house of Kotamma on that occasion hearing people crying inside that house. It is admitted on both sides that Kotamma died nine years ago and therefore defendant's sixth witness might have stated through weak memory that Kotamma died ten days after the incident he described.

4. Defendant's witnesses Nos. 1, 3 and 4 state that Kotamma made the declaration abovementioned at about 2 or 3 P.M. of the day. Defendant's witnesses Nos. 2 and 5 depose that she made that declaration in the morning hours of the same day. From the evidence of those witnesses who were all neighbours of Kotamma, it appears that they were frequenting her house many times on each day of her last illness and the incidents they speak to occurred about nine years ago. Therefore some confusion is probable in their recollection as regards the exact hour when Kotamma told her father that her daughter should take her estate after her death and that she should be married to the defendant. The incident they describe appears to be extremely probable. Kotamma left an only daughter who was also unmarried. She expected her death one day before she actually expired, according to the evidence on both sides. She must have then thought about the girl whom she was leaving an orphan, about the girl's marriage and her future protection. It is likely that she would have considered that her brother who was requested to marry the girl, would better care for the girl on account of the property she would get and also as he himself was her maternal uncle.

I therefore find the issue in the affirmative.

This appeal coming on for final hearing after the return of the finding of the District Judge the Court delivered the following.

JUDGMENT.—Taking into consideration the circumstances under which the will was made, we think it ought to be construed as containing a gift of an absolute estate.

We dismiss the second appeal with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Sankaran-Nair.

MANNADA MUDALI AND ANOTHER (DEFENDANTS NOS. 2 AND 3), APPELLANTS,

v.

NALLAYA GOUNDEN AND OTHERS (PLAINTIFFS NOS. 2 AND 4 TO 10), RESPONDENTS.*

1909, March 9, 16.

Public street—Right to carry religious processions in.

Continued user by the public of a way raises a presumption that that way belongs to the public and that it has been dedicated by the owner for the public use.

Farquhar v. Newbury Rural Council, [(1908), 2 Ch., 586 at p. 596], referred to.

All members of the public have a right to carry religious processions through such public way in a lawful manner irrespective of the religion to which they may belong.

SECOND APPEAL against the decree of S. Gopala Chariar, District Judge of Salem in Appeal Suit No. 84 of 1904, presented against the decree of A. N. Anantarama Ayyar, District Munsif of Námakkal in Original Suit No. 79 of 1902.

Suit for a declaration that the plaintiffs who were Vellalars were the sole owners of a certain path in Rajakaundanpoliem marked A in the plan attached to the plaint and that the defendants who were Kaikolars (weavers) had no right to pass through it with their deity, Muttukumarasawmi, and with *Sakkili melam*, at the time of their festival or at any other time and for an injunction restraining the defendants from passing along the path. The plaintiffs alleged that till 1900 the defendants did not celebrate any festival in the village in honour of Muttukumarasawmi, that when the defendant attempted in 1900 to pass in procession through the path in question the Vellalars objected; that the festival was therefore stopped; that in 1901 the defendants again wanted to celebrate the festival, and that on their application the Trichengode Magistrate issued an order, under section 144, Criminal Procedure Code, to the plaintiffs not to obstruct the celebration of the festival by the defendants and their passing through the path A.

* Second Appeal No. 612 of 1906.

It was also alleged in the plaint that on the strength of the Magistrate's order the defendants passed through the path singing songs containing expressions obnoxious to plaintiffs' caste and with *Śakkili melam* which is against the caste practices of the Vellalars and caused annoyance to them; that the path in question is not a public path and that the defendants have no right to pass through it.

The defendants denied the plaintiffs' exclusive right to the path in question and contended that the path in question was a public path in the village and not a private path as alleged in the plaint and they also had a right to use it for festival purposes.

The District Munsif dismissed the suit. On appeal his judgment was reversed and the plaintiffs' claim allowed.

The defendants Nos. 2 and 8 appealed to the High Court.

T. Subrahmania Ayyar for appellants.

H. Lubeck and *W. V. Rangaswami Ayyangar* for respondents.

JUDGMENT.—The question is whether the defendants, appellants, who belong to the Kaikolar (weaver) class are entitled to take their deity Kumaraswami in procession with *Sakkili melam* (music) along the path (marked A in the plan, Exhibit B) which passes through the middle of the Vellala quarter. The plaintiffs are Vellalars and sue for a declaration that the defendants are not so entitled, the cause of action being an order passed by the Magistrate under section 144, Criminal Procedure Code, restraining them from interfering with the defendants, Kaikolars, carrying their idol in procession.

The Munsif found that the path (A) was a public path, and does not belong exclusively to the Vellalars, as contended for by them, and he dismissed the suit. On appeal the Judge found that a portion of the path, he does not find which portion, "was formed by the plaintiffs' first witness and other persons slicing off from their sites for forming a way." He also found that the street was the property of the Vellalars. He further held that because all people walk on it without distinction and without objection, and because the union servants cleanse it, the defendants have not acquired the right they claim, and he accordingly allowed the plaintiff's claim.

It is contended before us that on the facts found the Judge should have held that this is a public path.

The Judge has found that this path has been used by all members of the public, including the Kaikolars, desiring to use it without any interruption or objection of any kind. There is no evidence as to the origin of the user, nor is there any evidence that the dedication, if made by the Vellalars as the Judge finds, was subject to any conditions. The village union clean the path. In a case where it was contended that no dedication ought to be presumed on account of the defective title of the owner who made the dedication, Warrington, J., said "The law appears to be this: that continued user by the public of a way raises a presumption that that way belongs to the public, that it has been dedicated by the owner for the public use for which it has been used and further that it is not incumbent upon the public to show by what particular owner the road has been dedicated. If dedication is possible, dedication will be assumed, *vide Farquhar* v. *Newbury Rural Council*(1). This judgment was confirmed in *Farquhar* v. *Newbury Rural District Council*(2). We are therefore of opinion that the path (A) is a public path.

As it is a public path the defendants, Kaikolars, have the same rights as the plaintiffs to conduct religious processions through it in a lawful manner. See *Sadagopa Chariar* v. *Rama Rao*(3).

The fact that they have not been conducting such processions is immaterial. The observations of Subrahmania Aiyar and Bashyam Aiyangar, JJ., in *Vijiaraghava Chariar* v. *Emperor*(4), have reference probably to carrying on religious worship as distinct from a religious procession. But if they are intended to apply to religious processions also, then they are opposed to a series of decisions including Full Bench rulings: and cannot be followed after the confirmation of the decision in *Sadagopa Chariar* v. *Rama Rao*(3), by the Privy Council in the case of *Sadagopa Chariar* v. *Krishnamoorthy Rao*(5).

We therefore set aside the decree of the lower Appellate Court and restore that of the Munsif with costs in this and the lower Appellate Court.

(1) (1908) 2 Ch., 596.
(2) (1909) 1. Ch. App., 12.
(3) (1903) I.L.R., 26 Mad., 376.
(4) (1903) I.L.R., 26 Mad., 555.
(5) (1907) I.L.R., 30 Mad., p. 185.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. March 8, 16.

NANJAPPA GOUNDEN (DEFENDANT), APPELLANT,

v.

PERUMA GOUNDEN (PLAINTIFF), RESPONDENT.*

Transfer of Property Act, IV of 1882, s. 51—Improvements, right to claim compensation for, when allowable.

Good faith within section 51 of the Transfer of Property Act is not necessarily precluded by facts showing negligence in investigating the title.

Where, however, a purchaser knows or must be presumed to know that the vendor could sell only under certain circumstances, and he either knows that such circumstances do not exist or wilfully abstains from making any enquiries on the subject, the mere fact that he purchased for consideration will not suffice to show good faith and he will not be entitled to claim compensation for improvements effected by him.

SECOND APPEAL against the decree of the District Court of Coimbatore in Appeal Suit No. 63 of 1905, presented against the decree of the Court of the District Munsif of Erode in Original Suit No. 685 of 1903.

V. C. Seshachariar for appellant.

T. M. Krishnaswami Ayyar for *T. Subramania Ayyar* for respondent.

JUDGMENT.—The question argued in the second appeal is, whether the defendant in the action is not entitled under section 51 of the Transfer of Property Act to be paid by the plaintiff the value of the improvements which the former has effected on the land before he can be ejected? The defendant purchased the property from certain Hindu females having a limited power of disposition over it, and he alleged in answer to the claim of the reversioner, who is the respondent in this appeal, that the alienation was made for family necessity, that is, to pay off pre-existing debts. This necessity the defendant failed to prove and has therefore to give up the land. But he made certain improvements while he was in possession of the property and their value is estimated by the Munsif at Rs. 500. Both the lower Courts

* Second Appeal No. 671 of 1906.

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have however negatived the defendant's right to be paid for his improvements on the ground that he not only failed to prove the necessity which he set up but that in fact he made no enquiries to satisfy himself of the existence of such necessity. The Munsif further relies on facts which show that the defendant was fully aware of the state of the family affairs of the two women who sold the land and he must have known that there was no necessity for selling it. That being so, although the purchase of the defendant was for consideration he would not have believed in good faith that it gave him a title to the property. His good faith at the time he made the improvements is based on the fact of this purchase and nothing more. What is urged in effect on behalf of the defendant is that even if he knew that he was purchasing the property from Hindu females who could sell it only under specified circumstances and that there was no need for them to sell the land still he might have believed that he had acquired a good title or otherwise he would not have spent money on its improvements. No doubt a purchaser may have notice of facts showing a defect in the title of his vendor and yet purchase the property honestly believing that he was buying good title. And we are not prepared to say that good faith within the meaning of section 51 of the Transfer of Property Act is necessarily precluded by facts showing negligence in investigating the title. In fact to hold that every default in investigating the title *ipso facto* makes section 51 inapplicable would be to exclude a very large class of cases from a rule which is based on obvious considerations of justice. But the facts of this case go much further. The defendant knew or must be presumed to have known, which is the same thing, that the persons purporting to sell the property could under the Hindu law sell it only under certain circumstances, and he either knew that these circumstances did not exist or wilfully abstained from making any enquiries on the subject. In such a case it is difficult to conceive that the purchaser could have believed and much less believed in good faith that the vendor conveyed a good title to the property.

We think therefore that the appeal fails and must be dismissed with costs.

APPELLATE CIVIL.

Before Mr. Justice Benson and Mr. Justice Miller.

KAKI SUBBANADRI (PLAINTIFF), APPELLANT,

v.

MUTHU RANGAYYA (DEFENDANT), RESPONDENT.*

1908. March 31. April 6.

Transfer of Property Act, IV of 1882, ss. 4, 107—Indian Registration Act, ss. 17 (d), 49—Proof of terms of oral lease by unregistered agreement in writing by tenant to occupy on certain conditions—Such evidence not excluded by s. 92 of the Evidence Act.

The effect of the closing words of section 4 of the Transfer of Property Act is that section 107 of that Act must be read along with section 17 (*d*) of the Registration Act, so as to add to the first sentence of section 17 (*d*) words to the following effect—"and all instruments referred to in section 107 of the Transfer of Property Act."

An instrument which does not fall within section 107 of the Transfer of Property Act is not compulsorily registrable because it falls within the definition of a lease in section 3 of the Registration Act.

A written undertaking by a tenant to occupy on certain conditions is not a document by which a lease can be made and is not an instrument referred to in section 107, although it is a lease within the definition in section 3 of the Registration Act Such a document is not compulsorily registrable, when section 17 (*d*) of the Registration Act read by itself does not require it to be registered, and its admissibility in evidence to prove an oral lease is not precluded by any thing in the Evidence Act or by section 49 of the Registration Act.

Turof Sahib v. *Yusuf Sahib*, [(1907), I.L.R., 30 Mad., 322], referred to.

APPEAL under section 15 of the Letters Patent against the judgment of Pinhey, J., dated 7th December 1908, in Civil Revision Petition No. 263 of 1908, presented to revise the decree of the Court of the District Munsif of Ellore in Small Cause Suit No. 1079 of 1907.

The facts of the case are sufficiently stated in the judgment.

T. Prakasam for appellant.

P. Nagabushanam for respondent.

JUDGMENT.—According to *Vairananda Nadar* v. *Miyakan Rowter*(1) (which was not referred to in argument) the effect of the closing words of section 4 of the Transfer of Property Act is to require the Court to read section 107 of that Act along with

* Letters Patent Appeal No. 102 of 1908.

(1) (1858) I.L.R., 21 Mad., 109.

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section 17 (*d*) of the Registration Act: and consequently to hold that all instruments referred to in section 107, Transfer of Property Act, are compulsorily registrable in all cases to which that Act is applicable.

We are to read section 107 as supplemental to section 17 (*d*) of the Registration Act, that is to say, we are to add to the first sentence of section 17 (*d*) words to the following effect: "And all instruments referred to in section 107, Transfer of Property Act." Section 4, as is pointed out in *Makhan Lal Pal* v. *Bunku Behari Ghose*(1) is not altogether clear, but it seems to us that, so far as we are concerned with it in this case, it cannot mean more than this. It cannot mean that an instrument which is not referred to in section 107, Transfer of Property Act, becomes compulsorily registrable because it falls within the definition of a lease in section 3 of the Registration Act.

Now, exhibit A is an undertaking by the tenant to occupy on certain conditions and is a lease within the definition in section 3 of the Registration Act. But it is not a lease which by section 17 (*d*) of the Registration Act read by itself is required to be registered and it is not an instrument referred to in section 107, Transfer of Property Act. That section refers to instruments by which a lease can be made, and the case of *Turof Sahib* v. *Esuf Sahib*(2) by which we are bound, decides that a document like exhibit A is not an instrument by which a lease can be made.

Exhibit A, therefore, is not one of the instruments to which section 107, Transfer of Property Act, refers and so is not compulsorily registrable; it follows that it is not affected by section 49 of the Registration Act and is admissible in evidence.

Now taking it that the plaintiff's case is that there was a letting by oral agreement accompanied by delivery, then the mere existence of exhibit A does not, in our opinion, prevent him from proving that case. We think it would be unreasonable to hold that if the plaintiff when making his lease by oral agreement and delivery of possession secures from the defendant written evidence of the terms of the agreement, his lease ceases to be a lease. But we need not go beyond *Turof Sahib* v. *Esuf Sahib*(2) for our decision. Exhibit A is not the document by which the lease is made, and therefore if the lease was made at all it was made some other

(1) (1892) I.L.R., 19 Calc., 623. (2) (1907) I.L.R., 30 Mad., 322.

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way. It was the transferor who makes the lease; he wrote nothing, he made the lease if there was in fact a lease by agreeing orally with the defendant to allow him to hold on certain conditions. There is, so far as we can see, nothing to prevent the giving in evidence of Exhibit A in proof of the conditions. There is nothing in the evidence Act to prevent the proof of an oral agreement by documentary evidence.

We allow the appeal and, reversing the decree, remand the suit to the District Munsif for disposal according to law. Costs will abide the event.

APPELLATE CIVIL.

Before Mr. Justice Munro and Mr. Justice Abdur Rahim.

1909. January 26. February 17.

ABBAKKI (PETITIONER-PLAINTIFF), APPELLANT,

v.

KRISHNAYA (RESPONDENT-SECOND DEFENDANT), RESPONDENT.*

Transfer of Property Act, IV of 1882, ss. 88, 89, 90—Personal liability of mortgagor, if adjudicated in suit, not to be treated as a nullity.

Section 90 of the Transfer of Property Act read with sections 88 and 89 show that the proper procedure to follow in mortgage suits is to postpone the consideration of personal liability for the amount decreed until the need for it arises when the sale-proceeds of the mortgaged property prove insufficient to pay the decree amount.

It does not necessarily follow however that where, with the consent of the parties, the Court had decided the question in the course of the suit, such decision is to be considered a nullity.

The reopening of the question under section 90 will be barred by *res judicata*.

CIVIL miscellaneous appeal against the order of H. O. D. Harding, Esq., District Judge of South Canara, in execution Petition No. 87 of 1907 (Original Suit No. 19 of 1904) on the file of the Subordinate Judge's Court of South Canara.

The plaintiff in a mortgage suit brought against the second defendant and others obtained a decree in the following terms:—

"This Court doth order and decree that the first or second defendant do pay to the plaintiff or into Court on or before 3rd November 1904 (i) Rs. 7,255-6-8 for the principal and interest

* Civil Miscellaneous Appeal No. 114 of 1908.

MUNRO AND ABDUR RAHIM, JJ.

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claimed, and (ii) Rs. 676-2-0 for his (plaintiff's) costs of the suit together with interest at 6 per cent. per annum on item No. 1 from the date of plaint (6th June 1904) and on the second item from this date (3rd August 1904) up to the date of payment. It is further ordered and decreed that if the net sale-proceeds realized as above be found insufficient, plaintiff do recover the balance from the first defendant personally."

The mortgaged property was sold and the sale-proceeds having proved insufficient, the plaintiff applied under section 90 of the Transfer of Property Act to make the second defendant personally liable for the deficit.

The lower Court made the following order:—

"The decree was against the property and first defendant personally and not against second defendant personally. There was a finding on this point in second defendant's favour. This was never appealed against and is final. Plaintiff cannot bring second defendant in again under section 90. This petition fails and is dismissed with costs. Rs. 7 to be paid by petitioner to respondent."

Plaintiff appealed. The sixth ground of appeal was as follows:—

The Court had no jurisdiction to determine in the suit itself questions properly arising under section 90, Transfer of Property Act, and therefore any judgment in the suit on such questions is not binding on the parties.

B. Sitarama Rao for appellant.

G. Annaji Rao for respondent.

JUDGMENT.—We think the order of the District Judge is right, and that the decisions in *Musaheb Zaman Khan* v. *Inayat-ul-lah*(1) and *Chandi Charan Roy Chowdhry* v. *Ambika Charan Dutt*(2) do not support the proposition which the appellant must establish if he wishes to succeed. Those cases do not lay down that, where the question of the personal liability of a mortgagor or his assignee was originally put directly in issue at the trial of the action and expressly adjudicated upon and negatived, and the decree which is in accordance with such adjudication is allowed to stand as final, even in such a case the decree-holder finding the sale-proceeds of the mortgaged property to be insufficient to satisfy his dues can apply under section 90, Transfer of Property Act, for an order for

(1) (1892) I.L.R., 14 All., 515. (2) (1904) I.L.R., 31 Calc., 792.

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the sale of the property of the person whose personal liability for the debt he sought to establish in the suit but failed. We think the re-opening of the question would be clearly barred under the above circumstances by the principle of *res judicata*, and the learned Judges who decided *Musaheb Zaman Khan* v. *Inayat-ul-lah*(1) seem to recognise this as they do not question the soundness of the decision in *Batak Nath* v. *Pitambar Das*(2). The learned vakil who appeared for the appellant was driven in order to maintain his ground, to contend that in a suit to enforce a mortgage the Court is not competent to decide in the first instance the question of the personal liability of the defendant, although the parties themselves might have asked for such a decision and that it acquires jurisdiction to deal with that question only after the security has been sold and its sale-proceeds are found to be insufficient. It is enough to say that there is nothing in reason or in the code to warrant such a contention. No doubt section 90 read with sections 88 and 89 shows that the proper procedure to follow in mortgage suits is to postpone the consideration of the right of the plaintiff to sell the properties of the defendant until the need for it has actually arisen, and that is all that is pointed out in *Musaheb Zaman Khan* v. *Inayat-ul-lah*(1), *Batak Nath* v. *Pitambar Das*(2), *Maliaperumal* v. *Nachiappa*(3) and *Chandi Charan Roy Chowdhry* v. *Ambika Charan Dutt*(4). But that is not sufficient for the appellant's purpose, and we are not prepared to go further and to say that the decision in the first instance on the question of the personal liability of the second defendant is to be regarded as of no effect in law. As regards the construction of the decree we have no doubt, reading it in the light of the judgment and the pleadings, that it clearly negatived the right of the appellant to hold the second defendant personally liable for the debt to any extent whatever.

The appeal fails and is dismissed with costs.

(1) (1892) I.L.R., 14 All., 515.
(2) (1891) I.L.R., 13 All., 360.
(3) (1895) 5 M.L.J., 294.
(4) (1904) I.L.R., 31 Calc., 792.

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CIVIL COURTS, JURISDICTION OF—*Mandatory injunction when not asked not to be granted—Suit for honours when sustainable—Decree must declare the honour to which plaintiff is entitled :*

Civil Courts have jurisdiction to entertain a suit for honours, if they are claimed as attached inseparably to an office, as part of its emoluments and not simply accorded to its holder as marks of respect which might be extended to any person to whom the same decree of respect is due. In declaring that the plaintiff is entitled to honours, the decree must declare the specific honours to which the plaintiff is entitled. A general declaration that the plaintiff is entitled to the honours appropriate to the office will not suffice, but the Court must, to protect the plaintiff in the enjoyment of the office, declare what is the honour to which he is entitled. The declaration need not set out honours, the right to which has not been questioned. The *first thirtham* is not itself an office, but an honour forming the emoluments of an office. A mandatory injunction ought not to be granted when it is not asked in the plaint.

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CIVIL PROCEDURE CODE, ACT XIV OF 1882, s. 43—*Suit for possession, no bar to subsequent suit for arrears of rent :*

A suit to eject a tenant holding under a lease is not a bar under section 43 of the Code of Civil Procedure to a subsequent suit to recover arrears of rent under the terms of the lease. The claim for rent is a distinct cause of action from that for the recovery of possession—the former arising when the rent accrues due and the latter when the tenancy determines. Section 43 requires only the joinder of claims arising out of the same cause of action and not claims arising out of any obligation created by the contract which creates the obligation on which the cause of action is based.

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4. ——————————————————, ss. 244, 294—*Confirmation of sale no bar to set aside sale in contravention of s. 294—Plaint or written statement in Court executing decree may be treated as application under s. 244—Burden of proof in suit to set aside sale :*

The holder of a mortgage decree brought the mortgaged property to sale in execution. He applied to the Court for permission to bid at the sale, and the Court granted him permission, fixing an amount as the minimum at which he was to bid. The decree-holder purchased the property at sale by Court in the name of a third party for a sum far less than the minimum fixed by the Court and less than the principal amount secured by the mortgage. The sale was confirmed and possession delivered to the purchaser, but actual possession remained with certain parties who had purchased the property from the original mortgagor. In a suit brought by the decree-holder and auction-purchaser, as plaintiffs in the Court which executed the decree, against the original mortgagor, and the purchasers from them as defendants, the defendants who discovered the fraud of plaintiffs subsequent to the confirmation of sale, contended that the sale to plaintiffs was fraudulent and contrary to the provisions of section 294 of the Code of Civil Procedure :—*Held* (1) that the confirmation of the sale was no bar to enforcing the right of defendants to set aside the sale, the fraud having been discovered only after such confirmation. *Held*, also per MILLER and SANKARAN-NAIR, JJ. (ABDUR RAHIM, J., dissenting) that it was open to the defendants to have the sale set aside in the suit by way of answer to the plaintiff's claim. *Per* ABDUR RAHIM, J.—The sale cannot be set aside except on an application by defendants under sections 294 and 244, Civil Procedure Code, to the Court executing the decree. *Per* SANKARAN-NAIR, J.—A plaint in a suit, in the Court executing the decree may be treated as an application under section 244 of the Code of Civil Procedure. So also a written statement, containing an answer to the plaintiff's claim may be treated as an application under section 244. Where a decree-holder purchases property in contravention of section 294, the judgment-debtor, seeking to set aside the sale, need not prove or allege fraud or that the property was sold at an undervalue. In such a case, and especially where the purchase money is less than the amount advanced on the land, it is for the decree-holder to show that the sale should be upheld. *Per* MILLER and ABDUR RAHIM, JJ.—The bare fact that the sale was in contravention of section 294 is not sufficient to set aside the sale as fraudulent. It must be shown that loss resulted to some one in consequence. *Mahomed Gazee Chowdhry* v. *Ram Loll Sen*, [(1884) I.L.R., 10 Calc., 757], followed. *Biram Ali Shaik Shikdar* v. *Gopi Kanth Shaha*, [(1897) I.L.R., 24 Calc., 355], followed.

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5. ——————————————————, s. 244—*Jurisdiction of Court to entertain separate suit in respect of matters falling within s. 244—Time for objecting to the maintainability of such suit :*

Where matter which ought to be decided in execution under section 244 of the Code of Civil Procedure is tried in a separate suit by the Court executing the decree, such Court does not act without jurisdiction, as the section does not affect the jurisdiction of the Court but only prescribes the form of procedure. *Purmessuree Pershad Narain Singh* v. *Jankee Koer* [(1873) 19 W.R., 90]. *Pasupathy Ayyar* v. *Kothanda Rama Ayyar*, [(1905) I.L.R., 28 Mad., 64], referred to. The objection should be taken in the Original Court.

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6. ——————————————————, s. 246—*Not applicable where both the decrees are not before the Court for execution :*

Section 246 of the Code of Civil Procedure applies only where both the decrees which are sought to be set off against each other are before the Court for execution. *Chajmal Das* v. *Lal Dharam Singh*, [(1902) I.L.R., 24 All., 481], followed. *Sinnu Pandaram* v. *Santhoji Row*, [(1903) I.L.R., 26 Mad., 428], distinguished.

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7. ——————————————————, ss. 295, 622—*Interference of High Court on revision against an order under s. 295 of the Code of Civil Procedure :*

The High Court will not, as a general rule, interfere by way of revision under section 622 of the Code of Civil Procedure, when the party has a remedy elsewhere than in the High Court. The High Court will however interfere, where the right of the party is clear and where the result of non-interference will be only to multiply proceedings by driving the party to a suit, in which there can be no defence. A Court, which has found that a party is entitled to rateable distribution under section 295 of the Code of Civil Procedure, has no discretionary power to refuse such relief; and in refusing to grant it such Court declines a jurisdiction vested in it by law.

Sree Krishna Doss v. *Chandook Chand* 335

8. ——————————————————, s. 318—*Limitation Act, Act XV of 1877, sched. II, arts. 178, 179—Application under s. 318 of the Code of Civil Procedure not an application for execution and falls within art. 178, sched. II of the Limitation Act :*

An application by a decree-holder, under section 318 of the Code of Civil Procedure, to be put in possession of property purchased, by him at sale in execution is not an application for execution of the decree and, for purposes of limitation, falls within article 178 and not within article 179 of schedule II of the Limitation Act. Such application is barred when presented more than three years after the grant of a certificate of sale. *Muttia Appasami*, [(1890) I.L.R., 13 Mad., 504], considered.

Sultan Sahib Marakayar v. *Chidambaram Chettiar* 186

9. ——————————————————, ss. 483, 491, 561—*Where attachment made on insufficient grounds, party injured can recover general damages—A memorandum of objections under s. 561, if not moved, ought to be dismissed :*

An order of attachment under section 483 of the Code of Civil Procedure, found by the Court, under section 491, to have been made on insufficient grounds, must necessarily cause damage to the credit and reputation of the party against whom the order is made; and such party is entitled, in a suit for damages, to general damages for loss of credit and reputation where the attachment is obtained maliciously and without reasonable and probable cause : *Quære.*—Whether in such a suit malice and want of reasonable and probable cause must be proved. The Court has jurisdiction over a memorandum of objections presented under section 561 of the Code of Civil Procedure, although it is not stamped or moved by the respondent at the hearing of the appeal, and where it is not so stamped or moved, the proper order is to dismiss it, with or without costs, at the discretion of the Court.

Kumarasamia Pillai v. *Udayar Nadan* 170

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10. ——————————————————, s. 522—*No appeal from a decree on an award except on the grounds mentioned in the section :*

Under section 522 of the Code of Civil Procedure of 1882, no appeal lies against a decree passed in accordance with an award, except on the grounds stated in the section. No appeal will lie on the ground that the award is void *ab initio*. *Chairman of the Purnea Municipality* v. *Siva Sankar Row*, [(1906) I.L.R., 33 Calc., 899], followed. *Indur Subbarami Reddy* v. *Kandadai Rajamannar Ayyangar*, [(1903) I.L.R., 26 Mad., 47], not followed.

Kanakku Nagalinga Naik v. *Nagalinga Naik* 510

11. ——————————————————, ss. 562, 591—*An order of remand on appeal cannot be reviewed by same Court subsequently—An order of remand not appealed against cannot be objected to in second appeal from the final appellate decree :*

A decree was reversed on appeal and the case was remanded for retrial. Against the decree passed at the remanded trial, an appeal was perferred and the Judge of the Appellate Court, who was the successor of the Judge who originally remanded the case, held that the previous order of remand was wrong, and allowed the appeal :—*Held*, on second appeal, that the original order of remand could not be reviewed by the lower Appellate Court, and could not be questioned on the second appeal under section 591 of the Code of Civil Procedure as such order was not appealed against.

Subba Lakshmamma v. *Venkatarayadu* 318

12. ——————————————————, ss. 562, 578—*Remand contrary to the provisions of s. 562 illegal and not merely irregular—Failure to appeal against an illegal order of remand not a waiver of the illegality :*

The Court of First Instance passed a decree in favour of plaintiff on the strength of a plan which was not disputed by the defendant. On appeal, the Appellate Court held that the plan was unsatisfactory and that a proper plan was necessary for a right decision of the suit and remanded the suit for retrial under section 562 of the Code of Civil Procedure. No appeal was preferred by plaintiff under section 588, Civil Procedure Code, against the order of remand and the lower Court again passed a decree in favour of plaintiff which was reversed on appeal. Plaintiff perferred a second appeal to the High Court :—*Held* : (1) That the original order of remand was contrary to the provisions of section 562 of the Code of Civil Procedure, as the Court of First Instance had not decided the suit on a preliminary point within the meaning of the section. (2) That such order was not merely irregular but illegal and could not be validated by section 578 of the Code of Civil Procedure. (3) That even if such illegal order might be validated by consent or waiver, neither the omission of the plaintiff to appeal under section 588 nor his acquiescing in the trial on remand amounted to such consent or waiver. *Subramania Ayyar* v. *King-Emperor*, [(1902) I.L.R., 25 Mad., 61], referred to. *Manager of the Court of Wards, Kalahasti Estate* v. *Ramasami Reddi*, [(1905) I.L.R., 28 Mad., 437] referred to.

Palani Chetty v. *Rangiadoss Naidu* 83

13. ——————————————————, s. 622—*Jurisdiction of Court to hear review not taken away by the presentation of an appeal :*

Where an application for review has been presented by a party to a suit and an appeal is afterwards preferred, the Court to which the application for review is made is not thereby deprived of jurisdiction to entertain the application. *Ramanadhan Chetty* v. *Narayanan Chetty*, [(1904) I.L.R., 27 Mad., 602], overruled.

Chenna Reddi v. *Peddaobi Reddi* 416

COLLATERAL SUCCESSION :—*See* "HINDU LAW" 88

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CONSIDERATION, ABSENCE OF—*Where deed purports to convey some title and is not intended to be a sham, and is known to the grantee and partially acted upon absence of considertion does not prevent passing of title :*

A deed, executed for no consideration but which purported to convey title and which was not intended by both the parties to be mere sham, will, if it is known to the grantee and partially acted upon and if the grantor knew the nature of the transaction, operate to convey the title which it purports to convey and not merely what the grantor intended to convey. *Yaramati Krishnayya* v. *Chundru Papayya*, [(1897) I.L.R., 20 Mad., 326], distinguished. *Ranga Ayyar* v. *Srinivasa Iyengar*, [(1898) I.L.R., 21 Mad., 56], referred to. *Ramalinga Mudali* v. *Ayyadorai Nainar*, [(1905) I.L.R., 28 Mad., 124], distinguished. *Ceicil* v. *Butcher*, [37 E.R., 744 at p. 749], referred to. When relief will be given in the case of voluntary conveyances considered.

Amirthathammal v. *Periasami Pillai* 325

CONTRACT ACT, ACT IX OF 1872, s. 23—*Contract to make a payment to the father in consideration of his giving his daughter in marriage is immoral and opposed to public policy—Hindu Law—Asura Marriage :*

On the question whether a contract to make a payment to a father in consideration of his giving his daughter in marriage is to be regarded as immoral or opposed to public policy within the meaning of section 23 of the Indian Contract Act :—*Held*, by the Full Bench, that such a contract was immoral and opposed to public policy. Although a marriage when performed in the Asura form is valid, an agreement to pay money to the father in consideration of such marriage is not valid and the money cannot be recovered by suit. If the money had been paid and the marriage solemnised, the money cannot be recovered back. *Visvanathan* v. *Saminathan*, [(1890) I.L.R., 13 Mad., 83], considered. *Vaithyanatham* v. *Gangarazu*, [(1894) I.L.R., 17 Mad., 9], considered. *Dholidas* v. *Fulchand*, [(1898) I.L.R., 22 Bom., 658], followed.

Kalavagunta Venkata Krishnayya v. *Kalavagunta Lakshmi Narayana* ... 185

2. ——————————————————, ss. 253 (10), 263—*Indian Insolvency Act, s. 7—Insolvency of sole surviving partner—Official Assignee takes subject to the rights and obligations of such surviving partner :*

On the death of a partner, the partnership is dissolved under section 253 (10) of the Indian Contract Act and, under section 263, the rights and obligations of the partners continue in all things necessary for the winding up of the partnership business. It becomes therefore the duty of the surviving partner to wind up the partnership ; and, as between such partner and the representative of the deceased partner, the former has, by virtue of this overriding duty, the power, if necessary, for the purpose of winding up the partnership business, to continue the business, to borrow moneys or to sell the partnership assets, real or personal. On the insolvency of the surviving partner, the interest of the insolvent in the partnership vests in Official Assignee, under section 7 of the Indian Insolvency Act, subject to the obligation of the surviving partner to wind up the partnership. The rights incidental to such obligation, *i.e.*, the right to realise the partnership assets and do all things necessary to wind up the partnership also vest in the Official Assignee. The right and obligation of the insolvent as surviving partner can be made available for the benefit of the firm in the insolvency proceedings under the vesting order and it is not necessary for the Official Assignee to institute a suit against the representative of the deceased partner for winding up the partnership.

Administrator-General of Madras v. *Official Assignee of Madras* 462

CUSTOM :—*See* "PUBLIC STREET" 478

CRIMINAL PROCEDURE CODE, ss. 45, 154, 161, 162 :—*See* "PENAL CODE, s. 211" 258

2. **CRIMINAL PROCEDURE CODE—ACT V OF 1898, ss. 196, 4 (b), 200, 225, 287, 537**—*Indian Penal Code—Act XLV of* 1860, *ss.* 109, 114, 124 (*a*)—*Evidence Act I of* 1872, *s.* 14 (*a*)—*Sanction under s.* 196, *Criminal Procedure Code, form of—Sanction to prosecute under s.* 124 (*a*) *will authorise prosecution under ss.* 124 (*a*) *and* 114, *Indian Penal Code—Complaint by Police officer not a police report under s.* 4 (*b*), *Criminal Procedure Code—Defects in complaint cured under s.* 537, *Criminal Procedure Code—Irregular order to investigate after cognisance under s.* 200, *Criminal Procedure Code—Defective charge under s.* 124 (*a*), *Indian Penal Code, curable under ss.* 537 *and* 225, *Criminal Procedure Code—Intention of speaker may be gathered from speeches other than those charged—Admissibility of speeches to prove object of conspiracy—Statement forwarded by accused admissible under s.* 287, *Criminal Procedure Code—Requisites of offence under s.* 124 (*a*), *Indian Penal Code* :

Section 196 of the Criminal Procedure Code only requires that the complaint should be made upon authority from the Local Government and not that the actual complaint must be expressly authorised by the Local Government. The Court has only to see whether the complaint is made by order or under authority of Government. *Queen-Empress* v. *Bal Gangadhar Tilak*, [(1898), 22 Bom., 122], referred to. Where a Police officer files a complaint in a non-cognisable case or regarding an offence of which it is not his duty to report, such complaint is a complaint within section 4 (b) of the Criminal Procedure Code and is not a police report. *King-Emperor* v. *Sada*, [(1902), 26 Bom., 150], referred to. A complaint is not defective because it did not set out the speeches or alleged seditious words which form the subject-matter of the subsequent charge. Even if such omission is a defect, it is an irregularity which will be cured by section 537(a) unless it has occasioned a failure of justice. When a magistrate, after duly taking cognisance of a case under section 200, Criminal Procedure Code, makes an order to investigate not authorised by law, such unauthorised order does not vitiate subsequent proceedings. A charge of an offence under section 124 (*a*) is defective if it does not set out the speeches alleged to be seditious; but such defect does not, under sections 537 and 225 of the Code of Criminal Procedure, vitiate the proceedings and any objection on the ground of such defect ought to be taken as early as possible. Where certain speeches form the subject-matter of a charge for sedition and when such speeches form part of a series of speeches or lectures on one topic, delivered within a short period of time, any of such speeches or lectures will be admissible, under section 14 of the Evidence Act, as evidence to prove the intention of the speaker in respect of the speeches which form the subject of the charge. *Queen-Empress* v. *Jogendra Chunder Bose* [(1892), 19 Calc., 35], referred to. *Emperor* v. *Phanendra Nath Mitter*, [(1908), 35 Calc., 945], referred to. The offence of abetting under section 109, Indian Penal Code, plus presence of the abettor on the occasion of the crime abetted is, constructively, under section 114, the offence abetted; and a sanction, under section 196 of the Criminal Procedure Code, to prosecute for an offence under section 124 (*a*), will authorise a complaint under section 124 (*a*) and section 114. Where an agreement exists between two parties, in pursuance of which speeches are delivered by them, such speeches are admissible to prove the object of the agreement.

Chidambaram Pillai v. *Emperor* 1

3. ——————————, s. 197—*Sanction not necessary to prosecute a Village Magistrate for making a false record* :

Sanction under section 197 of the Code of Criminal Procedure is not required to prosecute a Judge for any act, which is not done by him as such Judge. *Municipal Commissioners for the City of Madras* v. *Major Bell*, (I.L.R., 25 Mad., 15 at p. 23), referred to. A Village Magistrate, in trying a case, is not bound to make any record; and in fabricating a false record of an alleged criminal case, which had no existence, he is not acting as a Judge. No sanction is required under section 197 of the Code of Criminal Procedure for prosecuting him for such offence.

Palaniandy Pillai v. *Arunachellum Pillai* 2

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4. ——————————, ss. 225 and 537 :—*See* "PENAL CODE, s. 124-A" 384

5. ——————————, s. 339—*Full and true disclosure by approver—No condition precedent to pardon—Procedure on trial of approver* :

Under section 339 of the Code of Criminal Procedure of 1898, the making of a full and true disclosure by the approver, is not a condition precedent to the pardon but making an incomplete and false disclosure is a condition, subsequent by which the pardon, which has become operative before such disclosure, is forfeited. There is no necessity for withdrawing the pardon and such withdrawal has no effect. *Queen-Empress* v. *Ramasami*, [(1901) I.L.R., 24 Mad., 321], considered. *Queen-Empress* v. *Sudra*, [(1892) I.L.R., 14 All., 336], followed. *Queen-Empress* v. *Natu*, [(1900) I.L.R., 27 Calc., 137], followed. Where a pardon is tendered and the approver is afterwards put on his trial, he ought to be asked if he relies on the pardon as a bar to his trial; and if he does so rely, the prosecution should first prove that the pardon has been forfeited by an incomplete or false disclosure. When this course is not adopted, the conviction is illegal and will be set aside. *King-Emperor* v. *Bala*, [(1901) I.L.R., 25 Bom., 675], followed. *King-Emperor* v. *Kothia*, [(1906) I.L.R., 30 Bom., 611], followed. The transaction is one of the utmost good faith and the approver commits a breach of the condition if he fails to make a full and true disclosure throughout. The condition is broken if he withdraws before the Sessions Court or on cross-examination statements made before the Committing Magistrate or in his examination in chief respectively.

Kullan v. *Emperor* 173

6. ——————————, s. 339, cl. 3—*How sanction of High Court under section obtainable* :

The sanction of the High Court under section 339 (3) of the Code of Criminal Procedure can be obtained only by motion on behalf of the Crown. *Queen-Empress* v. *Manik Chandra Sarkar*, [(1897) I.L.R., 24 Calc., 492], followed.

Emperor v. *Madiga Nallavadu* 47

7. ——————————, s. 350—*Application of section to cases withdrawn from one Magistrate and transferred to another—'Trial' what is within s.* 350 (*a*) :

The words of section 350 of the Code of Criminal Procedure are applicable to cases in which the case under enquiry on trial is withdrawn from one Magistrate, who thereupon ceases, to exercise jurisdiction therein and is transferred to another. A preliminary enquiry by a Magistrate into a case exclusively triable by the Court of Session is not a 'trial' before framing a charge within section 350 (*a*) and, where such an enquiry is transferred, the Magistrate is not bound to rehear the case *de novo*. *Mohesh Chandra Saha* v. *Emperor*, [(1908) I.L.R., 35 Calc., 457], followed.

Palaniandy Goundan v. *Emperor* 218

8. ——————————, s. 423 (2) :—*See* "PENAL CODE, s. 400" ... 179

9. ——————————, ss. 435, 437, 438, 439—*District Magistrate has power under s.* 437 *to order further inquiry when accused discharged on misappreciation of evidence—Further inquiry may be by another Magistrate* :

On the question of the extent of the powers of interference of the High Court and a District Magistrate or Sessions Judge, under section 437 of the Code of Criminal Procedure, when an accused is improperly discharged on a misappreciation of evidence by a Subordinate Magistrate :—*Held*, by WALLIS and MUNRO, JJ. (SANKARAN-NAIR, J., dissenting), (1)

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That the powers of interference of the High Court and the District Magistrate or Sessions Judge are co-extensive under section 437 of the Code of Criminal Procedure, and they can set aside an order of discharge for reasons other than those which will justify the High Court in interfering on revision. (2) That the Sessions Judge or District Magistrate cannot, in the exercise of the power to order further inquiry, under section 437, himself frame the charge or order the Subordinate Magistrate to frame the charge and try the accused. The District Magistrate may, under the other part of the section, make the further inquiry himself and frame a charge in the course of such inquiry. (3) The Sessions Judge or District Magistrate is not bound to refer the case to the High Court in a case of difference of opinion, owing to mere misappreciation of evidence but would be justified in ordering a reconsideration of the same evidence. (4) Where the Subordinate Magistrate had dealt with the case in an unsatisfactory way, further inquiry by another Magistrate may be ordered; and such Magistrate may, if necessary, retake the evidence taken before the first Magistrate. *Hari Dass Sanyall* v. *Saritullu*, [(1888) I.L.R., 15 Calc., 608), dissented from. *Per* SANKARAN-NAIR, J.—Where the Sessions Judge or District Magistrate differs from the conclusion of the Subordinate Magistrate on the evidence, the only question is whether there should be a retrial and no useful purpose is served by a further inquiry. The Sessions Judge or District Magistrate must, in such cases, refer the matter to the High Court under section 438 and cannot order further inquiry under section 437. The powers conferred on District Magistrates and Sessions Judges by section 437 are not wider than the powers conferred on High Courts by section 439.

Narayanaswamy Naidu v. *Emperor* 220

10. ——————————, **ss. 435 and 437**—*Sessions Judge can order further inquiry on the ground of misappreciation of evidence:*

Under sections 435 and 437 of the Code of Criminal Procedure, the Sessions Judge has power to direct further inquiry by a Subordinate Magistrate when, in his opinion, an accused has been discharged by such Magistrate in consequence of an improper appreciation of evidence. *Lakshmi Narasappa* v. *Mekala Venkatappa*, [(1908) I.L.R., 31 Mad., 133], dissented from. *Queen-Empress* v. *Balasinnatambi*, [(1891) I.L.R., 14 Mad., 334], followed.

Venkata Subba Reddi v. *Ayyalu Reddi* 214

11. ——————————, **s. 476**—*Action under, must be taken at or immediately after the conclusion of the judicial proceedings:*

On the question whether a Court has jurisdiction to take action under section 476 of the Code of Criminal Procedure at any time after the conclusion of the judicial proceeding in the course of which the offence is committed:—*Held*, by the Full Bench (Miller J., dissenting) that the power conferred by section 476 can be exercised by the Court only in the course of the judicial proceeding or at its conclusion or so shortly thereafter as to make it really the continuation of the same proceeding in the course of which the offence is committed. *Rahimadulla Sahib* v. *Emperor*, [(1908) I.L.R., 31 Mad., 140], followed. *In re Lakshmidas Lalji*, [(1908) I.L.R., 32 Bom., 184], not followed. *Per* ARNOLD WHITE, C.J.—Section 476 is a self-contained section. Sub-section (1) gives the Court power to put the law in motion and sub-section (2) provides the procedure to be followed when the law has been put in motion. *Per* MILLER, J.—There is nothing to make section 476 inapplicable to any case to which the language of the section applies. The procedure provided by the section is not incompatible with the commencement of action by the Court after the close of the proceeding in the course of which an offence is committed or disclosed. *Per* SANKARAN-NAIR, J.—A Court may grant sanction at any time and to any person whom it considers fit to carry on the prosecution and who is entitled to proceed under section 190, Criminal Procedure Code. The order under section 476 is a judicial proceeding and not a complaint under section 195. *Per* PINHEY, J.—Sections 195 and 476 must be read

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together and section 476 prescribes the procedure to be adopted by the Courts when making a complaint, it was however the intention of the Legislature to restrict their power in this direction and only to suffer it when promptly exercised. The decision in the case of Rahimtulla Sahib does not decide that the final order under section 476 of the Criminal Procedure Code must issue at once. The Court must commence to take action under the section promptly, in which case it may be considered as a continuation of the proceedings; and although the final order may be delayed for some time by necessary enquiries, the order will not be bad for want of jurisdiction.

Ayyakannu Pillai v. *Emperor* 49

DARKHAST, GRANT OF LAND ON—*Grant by competent authority not to be set aside because not made in the manner prescribed:*

A grant of land on darkhast, by an authority competent to make such grant, cannot, where no fraud has been practised in obtaining such grant, be set aside on the ground that it was not made in the manner prescribed by the Board's Standing Order. *Collector of Salem* v. *Rungappa*, [(1899) I.L.R., 12 Mad., 404 at p. 406], followed.

Secretary of State for India v. *Bundeppa of Konakondla* 300

EASEMENT ACT, s. 7 (2) (a) and s. 7, Ill. (h):—*See* "WATER" 141

ESTATES LAND ACT (MADRAS) I OF 1908, s. 189—*Civil Courts have jurisdiction to hear and determine suits instituted before Act came into force:*

Section 189 of the Madras Estates Land Act does not take away from Civil Courts the jurisdiction to hear and determine suits which were taken cognizance of by them before the Act come into operation. The section merely bars cognizance of suits and says nothing of pending suits. *Sadasiva Pillai* v. *Kallappa Mudaliar*, [(1901) I.L.R., 24 Mad., 39], referred to. *Vedavalli Narasiah* v. *Mangamma*, [(1904) I.L.R., 27 Mad., 538], referred to.

Subbaraya Mudaliar v. *Rakki* 140

EVIDENCE ACT, I OF 1872, s. 14 (a):—*See* "CRIMINAL PROCEDURE CODE, ss. 196, 4 (b), 537, 287, 225, 200" 8

2. ——————————, **s. 54**:—*See* "PENAL CODE, s. 400" 179

3. ——————————, **s. 68**:—*See* "TRANSFER OF PROPERTY ACT, s. 59" ... 410

4. ——————————, **s. 92 (4)**—*Evidence of oral agreement to rescind or of subsequent conduct inadmissible—Mortgagee, right of usufructory, to sue for part of mortgaged property:*

Section 92 (4) of the Evidence Act precludes evidence of an oral agreement to rescind a registered contract or of subsequent conduct of parties to show that such contract was treated as non-existent. An usufructory mortgagee may sue for possession of only a part of the properties, mortgaged.

Srinivasaswami Aiyangar v. *Athmarama Aiyar* 281

5. ——————————, **s. 92**:—*See* "TRANSFER OF PROPERTY ACT, ss. 4 AND 107" 532

6. ——————————, **ss. 123, 124, 162**—*Income-tax Act II of 1886, s. 38 and rule 15—Statements made before income-tax officer not privileged under s. 123 or 124 of the Evidence Act—And not exempt from disclosure by s. 38 of the Income-tax Act and rule 15 of the rules:*

Statements made and documents produced by assessees before income-tax officers for the purpose of showing the income of such assessees do not

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refer to matters of State and are not privileged under section 123 of the Indian Evidence Act. The Collector, when summoned to produce such documents by the Court, is bound to produce them and the Court is empowered under section 162 of the Evidence Act to inspect them to decide on the validity of any objection to their admissibility in evidence. Section 38 of the Income-tax Act and rule 15 of the rules framed thereunder only forbid public servants to make public or disclose any information contained in such documents. The prohibition, however, does not extend to evidence given in Courts of Justice. Under the Income-tax Act the Collector can compel the production of documents and attendance of witnesses. Documents produced and statements made under process of law cannot be said to be made in 'official confidence' within the meaning of section 124 of the Evidence Act and they are not privileged under that section. *Lee* v. *Birrell*, [(1813) 3 Camp., 337], referred to. *Jadobram Dey* v. *Bullonam Dey*, [(1899) I.L.R., 26 Calc., 281], referred to. *In re Joseph Hargreaves*, [(1900) 1 Ch., 347), distinguished.

Venkatachella Chettiar v. *Sampathu Chettiar* 62

7. ————————, ss. 159 and 160 :—*See* "PENAL CODE, s. 124-A" ... 384

EXECUTION OF WILL:—*See* "WILL" 400

FOREIGN JUDGMENTS—*Jurisdiction of Court over absent foreigner—International Law—Judgment of Court against absent foreigners subject to the same sovereignty—Authority to bind absent foreigner must be conferred by express words by the supreme authority—Submission to jurisdiction of foreign Court, what amounts to :*

The rule of International Law that Courts cannot, by their judgments, bind absent foreigners who have not submitted to their jurisdiction is not restricted in its application to foreign Independent States only but is also applicable where the country in which the judgment was passed and that in which it is sought to be enforced have separate and distinct systems of administration and judicature, though owning allegiance to the same sovereign. A judgment of the Ceylon Court against a native of British India who was not, at the time of the action, resident in Ceylon and has not submitted to the jurisdiction of such Court, must be treated as a nullity when sued upon in Courts in British India. *Gurdyal Singh* v. *Raja of Faridkote*, [(1895) I.L.R., 22 Calc., 222], referred to. *Emanuel* v. *Symon*, [(1908) 1 K.B., 302], referred to. It may be competent to the common sovereign authority to confer jurisdiction on the Courts of one country over absent foreigners residing in the other; but such jurisdiction must be conferred by clear and unambiguous words and cannot be inferred as a matter of implication. A decree based on a contract imposing a personal obligation on an absent foreigner is not binding on him, even when the contract is made in the territory of the *forum* which passed the decree. A person who appears in obedience to the process of the foreign Court and applies for leave to defend the action without objecting to the jurisdiction of the Court when he is not compellable by law to do either, must be held to have voluntarily submitted to the jurisdiction of such Court. *Parry & Co.* v. *Appasawmy Pillai*, [(1899) I.L.R., 22 Mad., 407], distinguished. *Siva Raman Chetty* v. *Iburam Saheb*, [(1895) I.L.R., 18 Mad., 327], distinguished.

Shaik Atham Sahib v. *Davud Sahib* 469

FRAUDULENT TRANSACTION, RIGHTS OF PARTIES TO—*Relief given on grounds of public policy—User of fraudulent document by person, ignorant of its fraudulent nature does not estop such person—Pleadings, variation of, when allowable :*

The rule of law, which allows a defendant to protect himself against an action by the plaintiff on a contract made or deed entered into between them by showing the illegal or immoral nature of the transaction, is based on grounds of public policy and the benefit that accrues thereby to the

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defendant is the inevitable result of the application of such rule and is not based on any right to which he is entitled. The fact that the defendant had set up the transaction successfully as a shield against creditors will not be a bar to the application of this rule if the defendant, not being a party to the original transaction, was, at the time the transaction was so set up, a minor and had no knowledge of the real nature of the transaction. A defendant, who had just attained majority, and who had, in ignorance and without proper legal advice, admitted the claim of the plaintiff, may, when the truth is discovered by him subsequently, be allowed to resile from his original plea.

Raghavalu Chetty v. *Adinarayana Chetty* 323

FUNERAL EXPENSES, LIABILITY FOR:—*See* "HINDU LAW JOINT FAMILY" 191

GUARDIAN AND WARDS ACT, VII OF 1890, ss. 10, 11—*No guardian of property to be appointed in the case of a minor member of an undivided family governed by Aliyasunthanum Law :*

The only right of a minor member of an undivided family governed by Aliyasunthanum Law is a right to be maintained in the family house; and, where there are adult members of such family, no guardian of property of such minor can be appointed by the Court under the Guardian and Wards Act. No such appointment can be made, even with the assent of the adult members, as the minor has no property in respect of which a guardian can be appointed.

Kajikar Lakshmi v. *Maru Devi* 139

HINDU LAW—*Alienation by widow of part of her widow's estate, validity of—Consent of reversioners—Transfer by reversioner of revisionary interest—Estoppel of actual reversioner claiming through one who had given consent :*

An alienation, without justifying necessity, by a widow of a portion only of her limited estate, will not be validated by the consent of the next reversioners. *Marudamuthu Nadan* v. *Srinivasa Pillai*, [(1898) I.L.R., 21 Mad., 128], followed. *Bajrangi Singh* v. *Manokarnika Baksh Singh*, [(1908) I.L.R., 30 All., 1], referred to. A conveyance during the widow's life by a reversioner of his reversionary right is inoperative. A consent given by a reversioner, *bonâ fide*, and for good consideration, to an alienation by the widow will be binding on persons claiming through him. *Rangappa Naik* v. *Kamti Naik*, [(1908) I.L.R., 31 Mad., 366], referred to. *Per* MILLER, J.—The alienation by the widow will not be good, even if made with the consent of *all* the reversioners then in existence.

Muthuveera Mudaliar v. *Vythilinga Mudaliar* 206

2. ————————*Collateral succession—Property not taken from 'ancestor' does not devolve with incidents of ancestral property :*

Property inherited by one from a collateral relation, as a brother, uncle, etc., is not taken as, and subject to the incidents of, ancestral property, and his male descendants are not coparceners with him in respect of such property. *Karuppai Nachiar* v. *Sankaranarayanan Chetty*, [(1904) I.L.R., 27 Mad., 300], followed.

Gurumurthi Reddi v. *Gurammal* 88

3. ————————*Impartible estate, succession to—Liability of son for debts of father—Civil Procedure Code, Act XIV of* 1882, *s.* 234—*Impartible estates does not pass by survivorship but as separate property and constitute assets within the meaning of s.* 234, *Civil Procedure Code—Custom of non-alienability cannot be set up in execution proceedings—Mortgage decree not impeachable in execution proceedings—Attachment, effect of—Does not create a charge :*

A decree against a father can, when the father dies before the decree is fully executed, be executed against the son as representative by attaching

any separate property of the father inherited by the son. The joint family property in the hands of the son cannot however be so attached and sold. The owner for the time being of an impartible estate is the exclusive owner of such estate, subject to any custom restricting his powers of alienation and no other member of the family has any joint interest in it. Such estate devolves on the son not by survivorship as joint property but as the separate property of the father. Where such property devolves on a son from his father and the son as representative is proceeded against under section 234, Civil Procedure Code of 1882, in execution of decrees obtained against his father, the inherited estate will be assets for the purposes of section 234 of the Civil Procedure Code of 1882. *Nachiappa Chettiar* v. *Chinnayasami Naicker*, [(1906) I.L.R., 29 Mad., 458], not followed. *Raja of Kalahasti* v. *Achigadu*, [(1907) I.L.R., 30 Mad., 454], approved. Where an impartible estate in the hands of a son is attached in execution of decrees obtained against his father, it is not open to the son in execution to take objection on the ground that such estate is by custom inalienable. Such objection can only be taken by way of a separate suit. Such a custom does not necessarily imply the existence of co-parcenary rights which will make the property joint family property. *Ramasami Naick* v. *Ramasami Chetti*, [(1907) I.L.R., 30 Mad., 255], referred to. A decree for sale under the Transfer of Property Act cannot be impeached in execution proceedings but only by separate suit. *Kuriyali* v. *Mayan*, [(1884) I.L.R., 7 Mad., 255], dissented from. Attachment of property in execution does not give any title and confers on the attaching creditor no higher right than to have the property kept *in custodia legis* pending the determination of his rights.

Zamindar of Karvetnagar v. *Trustee of Tirumalai, Tirupati, etc., Devastanams.* 429

4. ——————JOINT FAMILY—PARTITION—PARTIAL PARTITION—LIMITATION ACT, ACT XV OF 1877, Sch. II, Arts. 32, 127—*When debts recovered by one member after division in status, right of other members to recover their shares, falls under art.* 62 *and not* 127—*Funeral expenses, liability for :*

Where a partial partition is proved or admitted to have taken place between members of a Hindu family, the presumption is that there has been an entire partition both with reference to rights and properties. Where the greatest portion of the properties have been divided, and where the parties subsequently continue to live separately and have separate accounts, and there is no managing member of the family and no reason is shown why they should have been continued joint in respect of the other properties, the parties must be considered as having become divided in status. Where the members of a joint family become divided in status, no member has a right, on behalf of the others, to recover any debt due to the family; and where it is so recovered, it is not joint family property, so as to entitle another member to recover his share by partition within the period provided by article 127 of schedule II of the Limitation Act. The article applicable in such a case is article 62 and a suit, brought more than three years after the recovery of the debt, by another member for his share will be barred by limitation. *Arunachalam* v. *Rameesamya*, [(1883) I.L.R., 6 Mad., 402], followed. The principle that the possession of one tenant-in-common is to be deemed possession on behalf of all, and limitation begins to run only after the exclusion of any tenant-in-common or after adverse possession is set up, will not apply in the case of joint families after a complete separation in status, as no member can then legally represent the others. Where, however, at the time of such division, one of the members is a minor and continues undivided from and under the guardianship of another, who afterwards collects certain debts due to the family, it will not be open to the guardian to say that he did not realise the minor's share of the debt on his behalf, as it was his duty to protect the minor's interest and he would have been guilty of dereliction of duty if he had omitted to do so. Where therefore he collects any such debts, he will be considered to have recovered the minor's share on behalf of such minor and the minor can recover his share within the period provided by article 127 of the Limitation Act. The funeral expenses of the mother are defrayable out of the family funds; but where, at the partition, an agreement is made regarding such expenses,

the divided member who, at his expense, performs such funerals, cannot recover contributions from the others except under the terms of such agreement.

Vaidyanatha Aiyar v. *Aiyasawmy Aiyar* 191

5. ——————*Joint family, right of, to manage charities—Such right until partition vests in the senior male member of the family :*

When the right to manage charities, without any beneficial interest in the charity properties, is vested in a joint Hindu family the senior male member of such a family is, until a partition is effected, entitled to exercise the right of management vested in the family on its behalf. Until partition is effected, no junior member is entitled to management by rotation, in the absence of an agreement recognising such right; nor is it competent to a Court to decree such a right on the ground of convenience.

Thandavaraya Pillai v. *Shunmugam Pillai* 167

6. —————— *Partition, suit for—Right to account—Claim for share of specific items bar to claim for a general account :*

Under the Mitakshara Law, a member of an undivided family who sues for partition, and who has not been excluded from the family is not, unless he establishes fraud or misappropriation, entitled to call upon the managing member to account for his past dealings with the family property. *Abhaychandr Roy Chowdhry* v. *Pyari Mohan Guho*, [(1869-70) 5 Beng L.R., 347], not followed. *Narayan Bin Babaji* v. *Nathaji Durgaji*, [(1905) I.L.R., 28 Bom., 201], followed. Where a plaintiff, suing for partition, prays for general account and claims a share in specific items alleged to have been received by the manager of the family, and attempts to prove the receipt of such items, he will not, on failing to prove such receipt, be allowed to claim a general account.

Balakrishna Iyer v. *Muthusami Iyer* 271

7. —————— :—*See* "CONTRACT ACT, s. 23" 185

8. ——————*Stridhanam—Property inherited by maiden daughter, nature of interest taken in—Daughter taken only limited estate :*

Inherited property is not *stridhanam* and the case of a maiden daughter succeeding to the *stridhanam* property of her mother is no exception to this general rule. The maiden daughter so succeeding takes only a limited estate. The inclusion by Vignanesvara of inherited property in the definition of stridhanam is not in accordance with other authorities and ought not to be accepted as law. *Virasangappa Shetti* v. *Rudrappa Shetti*, [(1896) I.L.R., 19 Mad., 110], followed. *Venkatarama Krishna Rao* v. *Bhyanga Rau*, [1896) I.L.R., 19 Mad., 107], not followed. *Narasayya* v. *Venkayya*, [(1892) 2 M.L.J., 149], not followed.

Jallakisetty Sooryudu v. *Miriyala Hanumayya* 521

9. ——————*Succession, woman's estate—Form of marriage proof of—Brahma and Asura marriages, essentials of :*

A married woman of the Kavarai caste (sudra) having died issueless, the question arose between the husband and the parents of the deceased as to who was entitled to succeed to her property. The evidence showed that at the marriage of the deceased woman, the Vivaha homam and the sapthapathi were not performed and it was argued for the parents, that in the absence of these ceremonies the marriage was not in the Brahma but the Asura form and that the parents and not the husband were entitled to succeed to the property. The evidence also showed in that community it was not customary to perform these ceremonies. It was also proved that the jewels given to the bride were given as presents to her and not as bride price and that the father when giving his daughter decked

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with jewels, pronounced the sloka, appropriate to the Brahma and Daiva forms of marriage:—*Held*, that according to Hindu Law, it must be presumed in the absence of evidence to the contrary that a marriage was in the Brahma form. Such a presumption cannot be made when it is shown that a certain community have till recently been following the Asura form of marriage. Though in this case the Court will not presume that the marriage was in the Asura form. The Asura form of marriage is not approved even for the Sudra classes. The distinctive mark of the Asura form is the payment of money for the bride, as the absence of such payment is of the approved forms. The offerings and ceremonies necessary to constitute a valid marriage are the same in the Brahma and the three other approved forms and in the Asura form. *Held*, further, the non-performance of the *homam* and *sapthapathi* may thus be relied upon to show there was no valid marriage where they form with or without others, a criterion of the intention to enter into the contract of marriage, but it cannot be relied upon to prove that the marriage was in any particular form. The customary payments of a trifling sum of money known as Payidimudupu cannot be regarded as bride-price. *Held*, on the facts stated above that this was a Brahma marriage and therefore that the husband was the heir of his wife.

Authikesavulu Chetty v. *Ramanujam Chetty* 512

10. ———————*Succession—Undivided son succeeds to father's self-acquired property, to the exclusion of divided son:*

Under the Law of the Mitakshara on the death of a father leaving self-acquired property, an undivided son takes such property to the exclusion of a divided son, although the division took place after the acquisition of such property as the father. *Fakirappa* v. *Yellappa*, [(1898) I.L.R., 22 Bom., 1901], referred to. Although the sons have by birth theoretically an interest in their father's self-acquisitions, still as the father can dispose of those acquisitions at pleasure, they are not coparcenary property in the ordinary sense and it is only the latter property that can form the subject of partition. After obtaining on partition his share of all the divisible property, the separating son loses all the rights which he had as a member of the coparcenary and it was only as a member of the coparcenary that he had by birth an interest in his father's self-acquisitions. All the right that remains to him with regard to his father's property is the right to inherit in the absence of undivided sons. An undivided son takes his father's separate property by survivorship and it becomes an addition to the joint property.

Nana Tawker v. *Ramachandra Tawker* 377

IMPARTIBLE ESTATE, SUCCESSION TO:—*See* "HINDU LAW" 429

INAM ENFRANCHISEMENT OF LANDS FRAMING—*Enfranchisement, no resumption and fresh grant—Adverse possession, right acquired by, can be inherited or conveyed—Lapse of time does not change character of estate:*

Where a service inam, which consists of land and not the assessment only thereon, is enfranchised, such enfranchisement only disannexes the land from the office and converts it into ordinary property releasing the reversionary right of the Crown in the inam. It has not the effect of a resumption and fresh grant so as to affect the rights of other persons existing at the time of the enfranchisement. *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya*, [(1907) I.L.R., 30 Mad., 434], referred to. A person holding property adversely for less than the statutory period, acquires, as against every one but the true owner, an interest capable of being inherited, devised and conveyed; and, where such an interest in service inam land is inherited by the widow, she takes only a widow's estate, which is not enlarged by subsequent enfranchisement; nor is it by continued possession for more than the statutory period, converted into an absolute estate. Mere lapse of time will not change the character of such estate, in the absence of evidence to show that she claimed an absolute interest in such properties.

Subbaraya Chetty v. *Aiyaswami Aiyar* 86

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INCOME-TAX ACT, s. 38 and Rule 15:—*See* "EVIDENCE ACT, ss. 123, 124, 162" 62

INDIAN INSOLVENCY ACT, s. 7:—*See* "CONTRACT ACT, ss. 253 (10), 263" ... 462

INSOLVENCY—*Banker and Customer—Fiduciary relationship, existence of between—Ordinary relation that of Creditor and Debtor—No fiduciary relationship when customer pays money to banker without special directions:*

The ordinary relation between a banker and customer, in respect of moneys paid by the latter to the former, is that of debtor and creditor and no fiduciary relationship will be created in the absence of directions by the customer which convert the banker into a trustee in respect of the sums so paid. A trust will exist when the banker is to collect and remit but not where he is to use and repay. Where a customer remits money to a banker with directions to receive such money in fixed deposit for a certain period together with another sum to be remitted, the banker does not, when the latter amount is not paid, hold the former sum in trust by virtue of such direction, although he cannot claim to hold it as a fixed deposit payable only after the limited period. *In re Hallette's Estate*, [(1879-80), 13 Ch.D., 696], referred to. *Dale's case*, (1879), 11 Ch.D., 772], referred to. *Foley* v. *Hill*, (2 H. L., 28), referred to. *In re Brown Ex parte Plitt*, (60 L.T.R., 397), referred to. *Burdick* v. *Garrick*, [(1869-70), 5 Ch.A., 233], referred to.

The Official Assignee of Madras v. *Smith* 68

INDIAN TRUST ACT, ss. 5, 81:—*See* "WILL" 443

INTERNATIONAL LAW:—*See* "FOREIGN JUDGMENTS" 469

LANDLORD AND TENANT—*Right of melvaramdar to distribute water—The right of the ryot to the customary supply of water is proprietary:*

As between the melvaramdar and the owner of the kudivaram, the right of the latter to the customary supply enjoyed by him is proprietary and not contractual. The former cannot by any agreement with third parties derogate from such right and the kudivaramdar can sue such third parties for an infringement of his right. The right of such kudivaramdar is different from that of an ordinary Government ryot. The Crown has, unlike the melvaramdar, the right to revise the assessment and to distribute water in the interests of the general public, subject to the claim of the ryot for a supply sufficient for his requirements.

Nynappa Servai v. *Veeran* 423

LETTERS PATENT, cl. 15:—*See* "NEGLIGENCE" 95

LIMITATION ACT, IX OF 1908, ss. 1, 31—*Section* 31 *applies to appeal pending before High Court on remand by the Privy Council:*

A suit on a mortgage was instituted within sixty years of the date when the money became payable and the appellate decree of the High Court decreeing the claim in such suit was reversed by the Privy Council and the case remanded before the Limitation Act of 1908 came into force. The appeal was pending disposal on such remand in the High Court when the said Act came into operation:—*Held*, that the case fell within the latter part of section 1 of the Act and that the plaintiff was entitled to the benefit of section 31 of the Act.

Srinivasa Pillai v. *Vasudeva Mudaliar* 312

———————, s. 4—*Civil Procedure Code, Act XV of* 1882, *s.* 54 (*b*)—*Plaint, though not sufficiently stamped is 'plaint' within the meaning of s.* 4, *of the Limitation Act—Suit not barred when plaint insufficiently stamped is presented within period of limitation, though stamp deficiency made good after such period:*

When a plaint is presented on a paper insufficiently stamped within the prescribed period of limitation, and time is given by the Court under

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section 54(b) of the Code of Civil Procedure to make good the deficiency and the deficiency is supplied within the time fixed by the Court, but after the period of limitation expired, the suit is not barred by limitation. The validity of a plaint for the purposes of section 4 of the Limitation Act is not dependent on its validity for the purposes of the Court Fees Act. *Venkataramayya* v. *Krishnayya*, [(1897) I.L.R., 20 Mad., 319], dissented from. *Jainti Prasad* v. *Bachu Singh*, [(1893) I.L.R., 15 All., 65], dissented from. Dictum of Sir SUBRAHMANIA AYYAR in *Assan* v. *Pathumma*, [(1899) I.L.R., 22 Mad., 494], approved and followed.

Gavaranga Sahu v. *Botokrishna Patro* 305

3. ——————————, s. 21—*Part-payment by one partner will save limitation only if made under authority from the other partners:*

A part-payment by one partner of a going mercantile firm of a debt due by the firm will not save the operation of limitation under section 21 of the Limitation Act XV of 1877 against the other partners, in the absence of evidence to show that, in the course of business, the partner who made the payment had authority to do so on behalf of the firm. *Premji Ludha* v. *Dossa Doongersey*, [(1886) I.L.R., 10 Bom., 358 at p. 362], referred to.

Palasubramania Pillai v. *Ramanathan Chettiar* 421

4. ——————————, Sch. II, Arts. 62, 127:—*See* "HINDU LAW JOINT FAMILY" 191

5. —————————— Sch. II, Art. 75:—*See* "RIGHTS OF SUIT"... 284

6. ——————————, Sch. II, Art. 91—*Where sale tainted by fraud, property not recoverable if sale not avoided within period—Such sale, if intended to be operative not void ab initio:*

A sale of property for consideration, intended to be operative between the parties, is not void *ab initio*, even though the transaction is brought about by fraud. Subsequent failure of consideration, in consequence of the purchaser refusing to perform his part of the promise, will only make the sale voidable. The title passes to the purchaser by such sale and the vendor of those claiming to recover on his title must get the sale avoided within the period prescribed by article 91, schedule II of the Limitation Act, before they can recover. *Sundaram* v. *Sithammal*, [(1893) I.L.R., 16 Mad., 311], distinguished. *Janki Kunwar* v. *Ajit Singh*, [(1888) I.L.R., 15 Calc., 58 at p. 65], followed. *Nabab Mir Sayad Alam Khan* v. *Yasin Khan*, [(1893) I.L.R., 17 Bom., 755] not followed.

Govindasami Pillai v. *Ramasami Pillai* 72

7. ——————————, Sch. II, Arts. 178, 179.:—*See* "CIVIL PROCEDURE CODE, 318" 136

LOCAL BOARDS ACT (MADRAS) V OF 1884, s. 156 (1) (3)—*No notice necessary in suits for injunction under s.* 156 (1) *as amended—Period of limitation prescribed in s.* 156 (3) *not applicable to such suits:*

Section 156 (1) of the Madras Local Boards Act V of 1884, as amended, does not apply to suits brought for an injunction and the notice prescribed therein is not necessary in the case of such suits. *Mahamahopadyaya Rangachariar* v. *The Municipal Council of Kumbakonam*, [(1906) I.L.R., 29 Mad., 539], followed. The period of limitation prescribed in section 156 (3) applies only in the case of suits falling within section 156 (1) and suits for injunction being outside the scope of section 156 (1), do not for purposes of limitation fall within section 156 (3). The amendment of section 156 in 1897 was not intended to alter the law previously laid down in decided cases.

Govinda Pillai v. *Taluk Board, Kumbakonam* 371

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LUNACY ACT, XXXV OF 1858—*Power of Court to control guardian appointed under Act:*

A District Judge, who has appointed a guardian for a lunatic under Act XXXV of 1858, has jurisdiction to make an order requiring such guardian to obtain his permission before marrying the lunatic.

Chellathammal v. *Ammayappa Mudaliar* 253

MALABAR COMPENSATION FOR TENANTS' IMPROVEMENTS ACTS (MADRAS) —I OF 1887 AND 1900—*Contracts entered into before 1st January 1886, effect of:*

Section 7 of the Malabar Compensation for Tenants' Improvements Act of 1887, which is reproduced as section 13 of the Act of 1900, does not affect the validity of contracts made prior to 1st January 1886, whether the improvement was made before or after the coming into operation of the Act of 1887. *Malikan* v. *Shankunni*, [(1890) 13 Mad., 502], dissented from.

Randupuravil Kunhisore v. *Neroth Kunhi Kannan* 1

MARUMAKATTAYAM LAW—*Separate property of member of tarwad lapses to the tarwad:*

On the question whether the separate property of a member of a tarwad lapses to the tarwad or is inherited by his tavazhi: *Held, per* Sir ARNOLD WHITE, C.J., and ABDUR RAHIM, J. (Miller, J., dissenting) that the separate property of a member of a tarwad lapses on his death to the tarwad. *Per* MILLER, J.—The separate property of a member of a tarwad is inherited by his tavazhi. *Kallati Kunju Menon* v. *Palat Erracha Menon*, [(1864-65) 2 M.H.C.R., 162], referred to.

Govindan Nair v. *Sankaran Nair* 351

2. —————————— *Validity of gift, excluding male issue, to wife and daughter—Right of last surviving daguhter—Construction of gift:*

A person governed by the Marumakattayam Law, executed a deed of gift in favour of his wife and three daughters under which they and their female descendants were to enjoy the properties hereditarily, males being excluded. The last surviving daughter made a gift of the properties to her own female descendants. In a suit by the female descendants of another daughter:—*Held*, that the condition excluding males was invalid. That the wife and daughters did not, on the construction of the deed, take as joint tenants in the English sense, so as to vest the whole property in the last survivor or as tenants in common. That the deed created a sort of thavazhi which was not different from an ordinary thavazhi in respect of descent so long as there remained any female descendant of any of the donees. That the last surviving daughter had no interest which she could validly convey.

Kunhimina v. *Kunhambi* 315

MUHAMMADAN LAW—*Partner, death of, effect on partnership—Guardian of property, who is—Power of* de facto *guardian to bind minor—Who is* de facto *guardian:*

Under Muhammadan, as under English, law, the death of a partner dissolves the partnership. The Muhammadan law does not recognise the joint family tenure of property prevailing among Hindus; and the rights and obligations incident to such tenure will not apply among Muhammadans. Co-owners under Muhammadan law hold their property in severalty. On the death of a Muhammadan, his heirs take their shares in severalty, as heirs and not as members of the family. One who is not a guardian under Muhammadan law, cannot by taking possession of the minor's property and dealing with it, claim the right to bind the minor by his acts as *de facto* guardian. *Mafazzal Hosain* v. *Basid Sheikh*, [(1907) I.L.R., 34 Calc., 36], distinguished. Under Muhammadan law, the father

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and his executors are the guardians of the minor's property and failing them, the grandfather and his executors. Failing these the Court must appoint a proper guardian. A, B and C, three Muhammadan brothers carried on a partnership business. A died leaving behind two minor sons D and E. B and C carried on the business for themselves and the minors and borrowed sums for the purposes of such business:—*Held*, that B and C had no power either as partners or managers of a joint family to bind D and E by their obligations; and not being guardians under Muhammadan law and not having been appointed by the Court as such, they had no power to act as *guardian de facto* for the minor sons.

Abdul Khader v. *Chidambaram Chettiyar* 276

NEGLIGENCE, LIABILITY FOR, OF CARRIER—*Carrier liable unless exempted by clear and unambiguous words—Bill of lading, construction of—Burden of proof—Contract by carrier exempting himself from liability for negligence is legal and not void as opposed to public policy—Letters Patent, clause* 15—*Whole case open on appeal:*

The defendants carried 4,000 bags of rice and other goods, consigned to plaintiffs from Rangoon to Tuticorin, under a bill of lading which contained *inter alia*, the following general condition:—"The said goods to be carried and delivered, subject to the terms and conditions hereof, including those at the foot of this bill of lading, in the like good order and condition, at the port of Tuticorin, the Act of God . . . . the Queen's enemies . . . . accidents, loss or damage from vermin . . . . accidents of sea, land . . . . of whatsoever kind, and accidents, loss or damage from any act, neglect or default of whatsoever of the pilot, master, mariners or other servants of the company excepted . . . ." Among the conditions at the foot of the bill of lading was the following:—"The company is to have the option of delivering these goods or any part thereof, into receiving ship or landing them at the expense and risk of the shipper or the consignee, as per scale of charges to be seen at the Agent's office, and is also to be at liberty, until delivery, to store the goods in receiving ship, godown or upon any wharf, the usual charges therefor being payable by the shipper or consignee . . . . In all cases and under all circumstances the liability of the company shall cease absolutely when the goods are free of the ship's tackle and thereupon the goods shall be at the risk, for all purposes and in every respect of the shipper or consignee." The ship arrived at Tuticorin and the defendants, under the powers reserved to them by the last recited clause, landed the cargo. In a suit brought by the consignees (plaintiffs) to recover for damages caused to the goods by the negligence of defendants' servants after such goods were free of the ship's tackle and before they were delivered to plaintiffs. *Held*, *per* Chief Justice and SANKARAN-NAIR, J. [*Wallis, J.*, dissenting] on the construction of the bill of lading, that the liability of the defendants at that stage was specially provided for by the last recited clause, that they could not invoke in aid the general negligence clause in the body of the document and that they were not exempted from liability for negligence. Exemption of shipowners from liability for negligence must be provided for in clear and unambiguous terms and must not be left to inference from general words. The words "in all cases and under all circumstances" in the last clause, though as wide and general as possible, will not cover the case of negligence, which must be expressly provided for. Under the contract and the circumstances of the case, the defendants had to prove that the goods were ready for delivery before they became damaged. *Per* WALLIS, J.—The bill of lading sufficiently protected the defendants from liability for negligence during the discharge of the cargo. The general condition in the bill will, by itself, limit the shipowner's liability during the whole time he was in possession of the goods and will apply during the loading and discharge of the goods. The last clause cannot be considered as imposing on the shipowner at that stage, a liability for negligence, which had been already generally stipulated for. The artificial rule of construction laid down by Walton, J., cannot be

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applied where the exemption clause does not stand by itself, but occurs in a bill of lading containing complicated stipulations, as the bill under consideration. In the latter case, the document must be considered as a whole. The last recited clause must be read with the general condition in the body of the bill and so read, clearly exempted the defendants from liability. The plaintiff's suit was not for non-delivery but for failure to deliver in proper order and condition; and the plaintiffs were bound to prove when they were delivered and also that the bags were in a bad condition at such time. *Per* Chief Justice and WALLIS, J.—In England it is competent to a shipowner to protect himself, by express contract, from liability for the negligence of himself or his servants. This is also the law applicable in India. *Per* SANKARAN-NAIR, J.—The rule of English law, which allows shipowners to exempt themselves, by express contract, from liability for negligence, cannot be applied in India, as it is inconsistent with the provisions of the Indian Contract Act and the manifest intention of the Legislature in enacting such provisions. Section 148 of the Contract Act includes bailments for carriage and the shipowner is a bailee in respect of the goods entrusted to him. Section 151 of the Act lays down the absolute minimum of care required of bailees. Having regard to the provision of section 152, which allows a bailee to undertake a higher responsibility, and to the absence of provisions allowing a bailee to limit such liability, the amount of care required by section 151 is irreducible by any contract between the parties. A contract limiting such liability will be opposed to public policy and void under section 23 of the Contract Act, as it will be against the interests of the mercantile community and not necessary in the interests of the shipowners. *Price & Co.* v. *Union Lighterage Company*, [(1903) 1 K.B., 750], referred to. *Rathbone Brothers & Co.* v. *MacIver Sons & Co.* [(1903) 2 K.B., 378], referred to. *Nelson Line (Liverpool) Limited* v. *James Nelson & Sons, Limited*, [(1908) A.C., 16], referred to. *Jellicoe* v. *The British India Steam Navigation Company*, [(1884) I.L.R., 10 Calc., 489], referred to. *The Irrawady Flotilla Company* v. *Bugwandas* [(1891) I.L.R., 18 Calc., 620], referred to. Per *Curiam*: In an appeal under clause 15 of the Letters Patent from the judgments of two Judges who have differed in opinion, the appeal is not confined to the point on which the learned Judges differed and the whole case is open on the appeal. *Kunhunni* v. *Sri Vallabhan*, [(1901) 11 M.L.J., 10], followed.

Sheik Muhamad Ravuther* v. *The British India Steam Navigation Company, Limited **95**

PARTIAL PARTITION:—*See* "HINDU LAW JOINT FAMILY" **191**

PARTITION:—*See* "HINDU LAW JOINT FAMILY" **191**

PARTITION, SUIT FOR:—*See* "HINDU LAW" **271**

PARTNER, RIGHT OF, TO SUE FOR CONTRIBUTION—*One partner, compelled to pay the whole of a partnership debt after dissolution, may sue for contribution, although right to sue for account of, and share in, the partnership assets may be barred:*

A partner who, after the dissolution of the partnership, has been compelled to pay a debt due by the partnership, can maintain a suit for contribution against his co-partners, even though a suit for general account of the partnership and a share therein is barred by limitation. The defendant, however, will, in such a case, be entitled to show that in a settlement of accounts he will not be liable, or that his liability would be reduced. *Sokkanadha Vannimundar* v. *Sokkanadha Vannimundar*, [(1905) I.L.R., 28 Mad., 344], principle applied. *Subbarayudu* v. *Adinarayudu*, [(1895) I.L.R., 18 Mad., 134], considered. The principle will apply equally whether the party suing is a partner or his representative.

Sadhu Narayana Aiyangar v. *Ramaswami Aiyangar* **203**

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PARTNERS—*Suit by one partner against another, without asking for general account when maintainable—Suit for specific performance of one term of partnership or for partial account—Waiver of grounds in lower Appellate Court:*

Where under the terms of a partnership, terminable at will, between *A* and *B*, *A* is bound to hand over to *B* who furnished all the capital, all moneys or cheques received by him in the course of the partnership business, irrespective of the state of the general accounts and *A* omits to deliver to *B* one of the cheques so received, *B* can maintain a suit against *A* to compel *A* to deliver such cheque or to pay him the amount of such cheque, whether such payment be regarded as a claim for damages or for partial account. In regard to suits by one partner against another for a partial account, the general rule, as applied in India, is that if the account is sought in respect of a matter, which, though arising out of partnership business, or connected with it does not involve the taking of general accounts, the Court will, as a rule, give the relief applied for. It will be for the Court to determine under what circumstances it will be equitable to order a partial account, having regard to the rights of the parties under the contract. There is no rule of law now in force that a partial account can be ordered only under exceptional circumstances. *Fairthorne* v. *Weston*, (67 Eng. Rep., 432), followed. *Golla Nagabushanam* v. *Kanakala Gangayya*, [(1864-5), 2 M.H.C.R., 28], not followed. Although the Court will not, as a rule, enforce a contract to enter into partnership while it remains executory, it will, when the partnership has been constituted and when the ends of justice require it, enforce by injunction the performance of particular terms, though it may be incompetent to enforce all the terms, and the partnership is terminable at will. The development of the law in England on the point considered. *Subbarayudu* v. *Adinarayudu*, [(1895), I.L.R., 18 Mad., 134], referred to. *Durga Prosonno Bose* v. *Raghu Nath Duss*, [(1899), I.L.R., 26 Calc., 254], referred to. A party who, in appealing from the decree of the Court of First Instance, confines himself to one only of several grounds on which such Court had decided against him, cannot, in second appeal, be heard on any of the grounds so abandoned.

Karri Venkata Reddi v. *Kollu Narasayya* 76

**PENAL CODE—ACT XLV OF 1860, ss. 109, 114, 124 (*a*):—*See* "CRIMINAL PROCEDURE CODE, ss. 196, 4 (*b*), 537, 225, 200, 287" 3

2. ——————————, s. 124-A—*Criminal Procedure Code, ss.* 225 *and* 537—*Actual words used, need not be stated in charge or proved in prosecution under s.* 124-A *of the Indian Penal Code—Evidence Act, ss.* 159 *and* 160—*Relevancy of notes of speeches, Held per* BENSON *and* WALLIS, JJ.:

The gist of an offence under section 124-A of the Indian Penal Code, is the bringing or attempting to bring into hatred or contempt or the exciting or attempting to excite disaffection towards His Majesty, etc. If an offence under section 124-A is committed by words spoken, the requirements of the law are satisfied if the charge gives such a description of the words used as is reasonably sufficient to enable the accused to know the matter with which he is charged, *i.e.*, if the charge states the words used with substantial, though not absolute, accuracy; and it is enough if the substance of the words proved to have been used, is the same as that of the words set out in the charge. Even if the words or the substance of the words used, are not entered at all in the charge, this will be only an irregularity which, under section 225 of the Code of Criminal Procedure, will not vitiate a conviction unless such omission has misled the accused and occasioned a failure of justice. *Chithambaram Pillai* v. *Emperor*, [(1909) I.L.R., 32 Mad., 37], preferred to. *Per* SANKARAN-NAIR, J.—Where a person is charged under section 124-A with exciting disaffection or bringing His Majesty into hatred or contempt, the exciting of disaffection and not the utterance of seditious words, is the gist of the offence and the charge need not set out the words, nor need the words themselves be proved. It is, however, quite different where the person is charged with *attempting* to excite disaffection. Attempt implies intention, and a man's intention must be gathered from the words used by him and not from what others rightly or wrongly understood him to mean. In such cases the words themselves are the gist of the offence and they ought to be set out in the charge; and whether set out or not must be proved. Where the words, though not actually in the charge, are indicated with sufficient certainty and the accused knows the words for which he is tried, the defect in the charge can be cured under section 225 or 537 of the Code of Criminal Procedure. What ought to be contained in a charge is a different question from what ought to be proved to secure a conviction; and although the omission to state the exact words may not vitiate the charge, the words themselves must be proved to convict a person for attempting to excite disaffection. Where a person records, not the actual words used, but simply notes of the impression made on his mind by a speech, such notes are inadmissible under section 160 of the Evidence Act to prove the actual words used.

Mylapore Krishnasami v. *Emperor* 384

3. ——————————, s. 124-A:—*Declaration under Act* 25 *of* 1867, *presumptive evidence of liability as printer and publisher—Criminal liability of proprietor of a newspaper—Authority of proprietor to publish, proof of—Section* 14 *of the Evidence Act:*

A person, making a statutory declaration under Act XXV of 1867, that he is the printer and publisher of a newspaper is presumably liable as such printer or publisher but may rebut such presumption. *Ramaswami* v. *Logaratha*, [(1886) I.L.R., 9 Mad., 387 at p. 390]. The liability of a proprietor is not governed by the Act and depends upon different considerations. The ground of liability in his case is that he authorised the publication of the incriminating article. The authority may be established by direct proof or as a reasonable inference from all the facts of the case. Under section 14 of the Evidence Act, it is open to the Court to presume that the proprietor, having the control of the paper, authorises the publication of the matter which appears in it. Such a presumption may be improper in the case of a large paper, with a separate editor responsible for the selection and publication of the literary matter; but in the case of a petty paper, with no responsible editor and published under the eye of the proprietor, the presumption might be reasonable though it would be open to him to rebut such presumption, by showing that the publication was in fact not authorised by him. Though no authority to publish libellous matter may have been originally given, such authority may be inferred from the conduct of the parties, such as the publication of other libellous matter without any remonstrance or interference from the proprietor when it has come to his knowledge. Other issues of the same paper containing libellous matter are relevant as evidence to prove such authority. Mere absence of the proprietor at the time of the publication of the libel will not rebut such presumption if during such absence he exercises complete control over the paper. The English law on the subject discussed. *Queen* v. *Holbrook*, (4 Q.B.D., 42), referred to.

Harisarvothama Rao v. *King-Emperor* 388

4. ——————————, s. 211—*Complaint to Village Magistrate is a charge and an institution of criminal proceedings within the meaning of section* 211, *Indian Penal Code, if it is his duty to forward such complaint for action by the Police—Criminal Procedure Code, ss.* 45, 154, 161 *and* 162:

On the question raised by a reference from the Sessions Judge whether a person giving false information about an alleged offence to a Village Magistrate can be prosecuted for an offence under section 211 of the Indian Penal Code:—*Held, per* BENSON and MUNRO, JJ. (SANKARAN-NAIR, J., dissenting), that a false complaint to a Village Magistrate of an offence, when the information is one which under section 45 of the Code of Criminal Procedure, the Village Magistrate is bound to pass on to the higher constituted authorities, will amount to an offence under section 211 of the Indian Penal Code. The words "false charge" in section 211

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must not be understood in a technical or restricted sense, but in its ordinary meaning of a false accusation made to any authority bound by law to investigate it or to take any steps in regard to it, such as giving information of it to superior authorities; and institution of criminal proceedings includes the setting of the criminal law in motion. The complaint to the Village Magistrate, in such a case, amounts to a "charge" and is also an institution of criminal proceedings within section 211 of the Code of Criminal Procedure. It would be otherwise, if the offence complained of is one in regard to which the information need not, under section 45 of the Code of Criminal Procedure, be passed to the higher authorities. *Ramana Gowd* v. *Emperor*, [(1908) I.L.R., 31 Mad., 506], dissented from. *Obiter*: The taking of a complaint to any of the other persons who, under section 45 of the Code of Criminal Procedure, are bound to pass such information to higher authorities, may also fall within section 211, Indian Penal Code. *Per* SANKARAN NAIR, J.—Where information of an offence, "given to a Village Magistrate," is forwarded by him to a Police officer and the latter takes a written statement from the person giving such information, such statement is not one taken under section 154 but under sections 161 and 162 of the Code of Criminal Procedure. It is not a complaint but a statement by a witness in an investigation under section 157 and no charge under section 211, Indian Penal Code, can be founded on such statement. To constitute a "false charge," it must be made to a Court or officer, who has powers to investigate and send up for trial. Section 45 of the Code of Criminal Procedure imposes the duty of forwarding information to superior authorities on a number of persons other than Village Magistrates and the Legislature could not have intended to constitute all such persons authorities before whom criminal proceedings may be instituted. Section 45 does not impose the duty of reporting in the case of bailable offences and if the duty to report is taken as the determining test, it will follow that the information is to be considered as a proceeding in some cases and in others not.

The Sessions Judge of Tinnevelly Division v. *Sivan Chetti* 258

5. ——————————, s. 400—*Criminal Procedure Code, Act V of 1898, s. 423 (2)—When verdict of jury can be interfered with—Evidence necessary to prove offence under s.* 400, *Indian Penal Code—Evidence Act I of 1872, s.* 54:

The Court will not, on appeal, interfere with the verdict of a jury, under section 423 (2) of the Criminal Procedure Code, unless it is satisfied that the verdict is erroneous, and that such error was caused by a misdirection by the Judge or misunderstanding on the part of the jury of the law as laid down by him. In a case under section 400, Indian Penal Code, the prosecution is bound to prove that the accused belonged to a gang, which was consciously associated for the purpose of habitually committing dacoity. The associating and the purpose of the association may be proved by direct evidence or by proof of facts from which they can be reasonably inferred. Evidence of the commission of other offences than dacoity is only evidence of bad character and is inadmissible under section 54 of the Evidence Act. Evidence that the accused or groups of them had been concerned in a large number of dacoities in a comparatively short space of time may be sufficient evidence of such association.

The Public Prosecutor v. *Bonigiri Pottigadu* 179

6. ——————————, ss. 464 and 467—*No false document where executant simply sets up a false claim but has no intention of causing belief that document was executed by another:*

A, who was not the son, natural or adopted, of the deceased *B*, executed a deed of mortgage of certain properties of *B* in a favour of *C*. In the body of the document *A* was described as the son of *B*, though no such description appeared in the signature. *A* was known to *C* for a long time and *A* had no intention of causing it to be believed that the document was executed by any other person than himself. *Held, per* MUNRO and ABDUR RAHIM, JJ., that *A* was not guilty of making a false document' within

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the meaning of section 464, Indian Penal Code. The assertion of a false claim in a document will not constitute the document false, when it is executed by the party who purports to execute it and there is no intention of causing a belief that it was executed by some other person, real or fictitious. *Per* PINHEY, J.—The document was a 'false document' as it contained a false description. *A* wanted to cause it to be believed that such a person as the son of *B* existed and his intention was to defraud the real heir, *i.e.*, the widow of *B*, *A* had thus committed the offence of 'forgery' within section 467, Indian Penal Code.

Adaikalammai v. *Raman* 90

PRISONS ACT IX OF 1894, s. 52—*Presidency Magistrate not a District Magistrate or Magistrate of the first class within s.* 52 *of the Act:*

A Presidency Magistrate is not a District Magistrate or Magistrate of the first class within the meaning of section 52 of the Prisons Act and he has no jurisdiction to try prisoners for offences under that section.

Emperor v. *Chota Singh* 303

PUBLIC STREET—*Right to carry religious processions in:*

Continued use by the public of a way raises a presumption that that way belongs to the public and that it has been dedicated by the owner for the public use, *Farquhar* v. *Newbury Rural Council*, [(1908), 2 Ch., 586, at page 596], referred to. All members of the public have a right to carry religious processions through such public way in a lawful manner, irrespective of the religion to which they may belong.

Mannada Mudali v. *Nallaya Gounden* 527

PUBLIC STREET, RIGHT TO CARRY RELIGIOUS PROCESSIONS IN—CUSTOM—*Right to obstruct such processions not claimable on the ground of usage or custom—When proof of damage necessary in suit brought for obstruction of procession:*

Persons of all sects and creeds are equally entitled to carry religious processions along public streets and thoroughfares and no particular sect can claim, on the ground of custom or immemorial use, an exclusive right to carry processions through such streets. The exercise of such right must not interfere with the ordinary use of such streets by the public and must be subject to such directions as the Magistrate may lawfully give to prevent obstructions of thoroughfare or breaches of public peace. *Sadagopachariar* v. *Krishna Moorthy Rao*, [(1907), I.L.R., 30 Mad., 185 at 190], referred to. An action for obstructing a procession may not be maintainable without proof of special damage. Where, however, an illegal order of the Magistrate has been procured restraining such procession, a suit to declare the right to carry such procession is sustainable without such proof, the cause of action being the improper order so obtained by the defendants.

Kandasami Mudali v. *Subroya Mudali* 478

REGISTRATION ACT, ss. 17 (*d*), 49:—*See* "TRANSFER OF PROPERTY ACT, ss. 4, 107" 532

RIGHT OF SUIT, CIVIL PROCEDURE CODE, ACT XIV OF 1882, ss. 30, 539—*Suit by subscribers of society, maintainability of:*

Some of the subscribers to a society brought a suit on behalf of themselves and other persons interested against the office-bearers and members of the society, for the removal of the office-bearers and for an account of the affairs of the society. No sanction of the Advocate-General under section 539 of the Code of Civil Procedure or permission of Court under section 30 of the Code for bringing the suit was obtained by the plaintiffs. Under the rules of the society the subscribers as such, had no control over the officers of the society or the conduct of the society's affairs and

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they were not beneficiaries having any claim on the funds of the society. *Held*, that they had no right to maintain the suit. *Per* SIR ARNOLD WHITE, C.J.—Even if it is assumed that the suit was maintainable without the sanction of the Advocate-General under section 539 of the Code of Civil Procedure, the plaintiffs cannot maintain the suit as they were not members of the society and their rights were in no way analogous to the rights of worshippers in a Hindu temple, who could maintain a suit in their own right. *Per* ABDUR RAHIM, J.—Assuming that the defendants are in the position of trustees of the society, liable to be sued for misconduct by persons interested, the plaintiffs cannot maintain a representative suit without sanction or leave obtained under section 539 or 30 of the Code of Civil Procedure. Section 539 is enabling as regards the general public interested, in the sense that two persons may sue now *where it would have been necessary before that all should sue*, or that some should obtain leave to sue on behalf of the rest. *Thackersey Dewraj* v. *Hurbhum Nursey*, [(1884), I.L.R., 8 Bom., 432], distinguished. *Budree Dass Mukim* v. *Ohooni Lal Johurry*, [(1906), I.L.R., 33 Calc., 789], referred to. *Subbayya* v. *Krishna*, [(1891), I.L.R., 14 Mad., 186], referred to.

D'Cruz v. *D'Silva* 131

RIGHT OF SUIT—*Suit by one member of an undivided family on contract in his name for the benefit of family not maintainable though the others acquiesce—Limitation Act, sched. II, art. 75—Waiver—Resolution of meeting, not convened according to rules but notified to all members—Account stated, when enforceable as a fresh contract—Second appeal, whom appellant ought to make parties to:*

Where the rules of a gramajenam provide that resolutions passed at a general meeting shall be binding on all the members, a resolution at a general meeting held after notice to all the members, will be so binding, although the meeting was not convened in the manner laid down by the rules. The general authority to bind all members by a resolution will include an authority to make an acknowledgment or to enter into a fresh contract on behalf of all the members. A resolution, accepting accounts and agreeing to pay in instalments, is a fresh contract, on which a suit may be brought. Where the benefit of a contract belongs to an undivided family and a fresh contract by which the original contract is discharged is entered into in the name of one only of the members of such family, all the members of the family are necessary parties to a suit on the fresh contract. A suit brought by the member in whose name the contract was made must be dismissed, when the other members are joined as parties after the period of limitation had expired; and the acquiescence of the other members will not cure such defect. Mere abstinence from suing will not constitute such a waiver as will postpone the starting point of limitation in cases falling within article 75 of schedule II of the Limitation Act. *Ramanujachariar* v. *Srinivasachariar*, [(1899), 9 M.L.J., 103], not followed. *Adaikkalam Chetty* v. *Marimuthu*, [(1899), I.L.R., 22 Mad., 326], not followed. An appellant on second appeal ought to add as parties all those whom he had made parties in his appeal to the lower Appellate Court.

Seshan Patter v. *Veera Raghavan Patter* 284

RIGHT TO ACCOUNT:—*See* "HINDU LAW" 271

SALE IN EXECUTION OF MORTGAGE DECREE—*Rights of purchasers at different Courts sales of same property—Purchaser at prior sale on subsequent mortgage takes the entire interest of judgment-debtor—Fraudulent sale, proof of—Relief not claimed in plaint, granting of:*

The same property was sold by Court at different times in execution of two mortgage decrees obtained against such property. The first sale was in execution of the decree on the subsequent mortgage obtained in a suit in which the prior mortgagee was not impleaded and was held while the suit on the first mortgage to which the second mortgagee was no party was pending. The purchaser at the subsequent

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sale on the first mortgage sued to recover possession from the prior purchaser of the property and the plaint also contained a prayer for such other relief as the plaintiff may be found entitled to:—*Held*, that all the interest of the judgment-debtor passed to the purchaser at the first sale and the purchaser at the second sale of the judgment-debtor's interest in the property took nothing, as the judgment-debtor had then no saleable interest in the property. The suit to recover possession was not therefore maintainable. *Venkatanarasummah* v. *Ramiah*, [(1879), I.L.R., 2 Mad., 108], followed. *Akatti Moidin Kutty* v. *Chirayil Ambu*, [(1903), I.L.R., 26 Mad., 486], followed. The rights of a prior or subsequent encumbrancer will remain unaffected by a sale held in execution of a decree to which he was no party. Any such rights of the plaintiff cannot be enforced in the suit brought by him for possession, as a claim for redemption or for sale is not of the same nature as a claim for ejectment and cannot be tacked on and decreed in a suit brought for ejectment. *Gopi Narain Khauna* v. *Bousidhar*, [(1905), I.L.R., 27 All., 325 at p. 331], distinguished. *Venkataramana Iyer* v. *Gomperts*, [(1908), I.L.R., 31 Mad., 425], distinguished. The mere fact that a defendant did not contest the plaintiff's claim which was in part excessive, is not sufficient to show fraudulent collusion between the plaintiff and defendant.

Kutti Chettiar v. *Subrahmania Chettiar* 485

SECRET TRUSTS:—*See* "WILL" 443

SPECIFIC RELIEF ACT I OF 1877, ss. 15, 17—*Section 15 does not apply where undivided father, without concurrence of his sons, agrees to sell—Decree in such cases in suit for specific performance against the father and son:*

An undivided father has an interest in and under certain circumstances a power of disposal over every portion of the undivided property. Section 15 of the Specific Relief Act will not apply where an undivided father contracts to sell undivided property without the concurrence of his undivided son. Where such an agreement is sought to be enforced in a suit which the father and son are joined as defendants, the proper decree to be passed is one directing the sale by the father of the entire property on payment of the whole consideration, without determining whether the sale will be binding on the son and not one directing the father to sell his one half share on payment of one half of the purchase money. *Kosuri Ramaraju* v. *Ivalury Ramalingam*, [(1903), I.L.R., 26 Mad., 74], followed.

Srinivasa Reddi v. *Sivarama Reddi* 38

TRANSFER OF PROPERTY ACT, IV OF 1882, ss. 4, 107—*Registration Act, ss. 17 (d), 49—Proof of terms of oral lease by unregistered agreement in writing by tenant to occupy on certain conditions—Such evidence not excluded by s. 92 of the Evidence Act:*

The effect of the closing words of section 4 of the Transfer of Property Act is that section 107 of that Act must be read along with section 17 (*d*) of the Registration Act, so as to add to the first sentence of section (*d*) words to the following effect—"and all instruments referred to in section 107 of the Transfer of Property Act." An instrument which does not fall within section 107 of the Transfer of Property Act is not compulsorily registrable because it falls within the definition of a lease in section 3 of the Registration Act. A written undertaking by a tenant to occupy on certain conditions is not a document by which a lease can be made and is not an instrument referred to in section 107, although it is a lease within the definition in section 3 of the Registration Act. Such a document is not compulsorily registrable, when section 17 (*d*) of the Registration Act read by itself does not require it to be registered, and its admissibility in evidence to prove an oral lease is not precluded by anything in the Evidence Act or by section 49 of the Registration Act. *Turof Sahib* v. *Esuf Sahib*, [(1907), I.L.R., 30 Mad., 322], referred to.

Kaki Subbanadri v. *Muthu Rangayya* 532

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2. ——————————————————————, s. 51—*Improvements, right to claim compensation for, when allowable:*

Good faith within section 51 of the Transfer of Property Act is not necessarily precluded by facts showing negligence in investigating the title. Where, however, a purchaser knows or must be presumed to know that the vendor could sell only under certain circumstances, and he either knows that such circumstances do not exist or wilfully abstains from making any enquiries on the subject, the mere fact that he purchased for consideration will not suffice to show good faith and he will not be entitled to claim compensation for improvements effected by him.

Nunjappa Gounden v. *Peruma Gounden* 530

3. ——————————————————————, s. 59—*Evidence Act, s.* 68—*Mortgage registered or unregistered not duly attested admissible to prove personal covenant to pay:*

A mortgage, which is not attested or attested by only one witness is admissible as evidence of a personal covenant to pay contained therein, whether such mortgage is registered or unregistered. *Madras Deposit and Benefit Society* v. *Oonnamalai Ammal*, [(1895), I.L.R., 18 Mad., 29], overruled. *Sadakavaur* v. *Tadepally Basaviah*, [(1907), I.L.R., 30 Mad., 284, at p. 288], followed. A document which purports to be a mortgage, but is not a mortgage owing to non-compliance with the provisions of section 50 of the Transfer of Property Act regarding attestation, is not a document which is required by law to be attested within the meaning of section 68 of the Evidence Act, and is admissible to prove the personal covenant to pay therein, which is not required by law to be attested.

Pulaka Veetil Muthalakulangara Kunhu Moidu v. *Thiruthipalli Madhava Menon* 410

4. ——————————————————————, ss. 88, 89, 90—*Personal liability of mortgagor, if adjudicated in suit, not to be treated as a nullity:*

Section 90 of the Transfer of Property Act read with sections 88 and 89 show that the proper procedure to follow in mortgage suits is to postpone the consideration of personal liability for the amount decreed until the need for it arises when the sale-proceeds of the mortgaged property prove insufficient to pay the decree amount. It does not necessarily follow however that where, with the consent of the parties, the Court had decided the question in the course of the suit, such decision is to be considered a nullity. The reopening of the question under section 90 will be barred by *res judicata*.

Abbakki v. *Krishnaya* 534

TRIAL, WHAT IS WITHIN, s. 350 (*a*):—See "CRIMINAL PROCEDURE CODE," s. 350 (*a*) 218

TRUSTEE, DUTIES OF—*Discretionary power, exercise of—Improvident transaction of trustee not binding on beneficiary of liability of transferee of trust estate—Compromise by trustee, when valid—Burden of proof—Decree may direct party, benefiting by breach of trust to pay to the trust estate when removal of trustee is not asked for—Following trust property:*

It is no answer to a charge of breach of trust that the trustee acted under competent legal advice. A trustee is bound to make as reasonable and a transaction which circumstances show to be unreasonable or improvident, such a transferee will not be absolved merely because, in his opinion, the transaction was prudent and beneficial to the *cestui que trust*. Where a transaction by the trustee is *primâ facie* improvident, it lies upon the trustee to show, as against the beneficiary, that it is one which the Court can uphold. Where a breach of trust has been committed and a suit is brought by the beneficiary against the trustee and the party who has received money through such transaction to recover such money for the trust estate, it is open to the Court by its decree to direct payment of such money to the trustee by the defendant who has received such payment unless it is established that the beneficiary can get no relief unless he seeks to remove the trustee and procure the appointment of another. Where trust-money has, by a breach of trust, been paid by the trustee, the beneficiary is entitled to follow it as trust-property in the hands of the payee. *National Trustees Company of Australasia* v. *General Finance Company of Australasia*, [(1905) A C., 273], referred to. *Keating* v. *Keating*, [(1835) 46 R.R., 178], followed. *In re Barney*, [(1892) 2 Ch., 265], distinguished. *Smith* v. *Patrick*, [(1901) A C., 294], referred to. *Guyana Sambandha Pandara Sannadhi* v. *Kantasami Tambiran*, [(1886) I.L.R., 10 Mad., 375 at p. 508], distinguished. *Srinivasa Ayyangar* v. *Srinivasa Swami*, [(1893) I.L.R., 16 Mad., 31 at p. 33], distinguished.

Subramanian Chettiar v. *Rajeswara Dorai* 490

VOLUNTARY PAYMENT, WHAT AMOUNTS TO:—See "WATER, RIGHT TO" ... 456

WATER, RIGHT TO—MADRAS ACT VII OF 1865—*Extent of right to tax free water to be implied in Grants by Government—Voluntary payment, what amounts to:*

A grant by the Government of the right to collect the revenue of certain lands will, in the absence of a contract regarding water rights, carry with it, by implication, only an undertaking on the part of Government not to refuse to the ryots holding nunja lands, the quantity of water necessary to enable them to irrigate those lands and so to pay the revenue which they had paid to the Government before the grant. In 1826 the Government granted to A by a cowle the revenues of a village T., which was irrigated by a tank. The cowle specified the lands granted and no portion of the bed of the tank was included in the grant. The ryots of T. and those of other villages were drawing water from the tank by turns in shares proportioned to the extent of their acreage. The Government had on certain occasions levied the cost of repairing the tank in accordance with such shares. In a suit by the grantee of T. against Government to recover moneys collected from him as water-cess under Madras Act VII of 1865:—*Held*, that the above arrangement regarding the distribution of water by turns and the action of Government in collecting the cost of repairs according to the shares in which the water was so drawn was merely evidence of a customary distribution of the water in the tank according to the areas served by it and was no evidence of the grant of any definite share of the water by Government. The ryots might demand that not less than the share should be sent down to their lands if required for the irrigation of those lands, but the Government was not bound to supply them with more than was required for the irrigation of the land irrigated at the time of the grant. Where the quit-rent on an inam is fixed on the income derived from the cultivation of a certain extent of land in a certain manner, the inamdar is entitled to use, free of water-rate, such quantity of water as may be required for the cultivation of such extent in the mode in which such income was calculated, whether the water-rate is leviable as a tax or otherwise. The engagement between the Inam Commissioner and inamdar amounts to an engagement by which the Government undertakes not to take more than a certain share of the income derived from the various sources taken into account in arriving at the amount of such income, as the consideration for relinquishing its reversionary right. The Inam Commissioner having power to sell the reversionary right of Government had the power to fix the price according to the rules framed by Government and any enagagement by him in that respect, not in contravention of such rules, will be binding on Government. Where the income on which the quit-rent is calculated includes the income derivable from a second crop on a certain extent of wet land and from a single irrigated crop on a certain extent of dry land, no charge except the quit-rent, can be levied as water-cess or otherwise in respect of such extent for such cultivation. Payment made under threat of distress and sale,

before the actual issue of the warrant of distress, will not be a voluntary payment if, on non-payment before the specified date, such warrant would be issued as a matter of course. *Narayanasawmy Reddi* v. *Osuru Reddi*, [(1902), I.L.R., 25 Mad., 548], referred to.

Lutchmee Doss v. *Secretary of State for India* ... ... 32 Mad., 45(

WATER, RIGHT OF GOVERNMENT TO DIVERT AND DISTRIBUTE BY IRRIGATION WORKS—*No action against Government without proof of damage—Paramount right of Government higher than that of riparian owners—Easement Act, Act V of 1882, s. 7 (2) (a) and s. 7, ill. (h)—Right of diversion for riparian and non-riparian purposes—Right of riparian owner to take out water put in by himself:*

The Government has power, by the customary law in India, to regulate in the public interests, in connection with the collection, retention and distribution of waters of rivers and streams flowing in natural channels, and of waters introduced into such rivers by means of works constructed at the public expense, and in the public interests, for purposes of irrigation, provided they do not thereby inflict sensible injury on other riparian owners and diminish the supply they have hitherto utilised. In regard to works of irrigation constructed by Government in connection with a natural stream, a riparian owner has no higher right than that of not being damaged by any diminution in the supply of water he has been accustomed to receive. The onus of proving damage lies on the riparian owner. The maintenance of irrigation works is a duty cast upon Government and the rights and liabilities of Government in connection with irrigation works are not commensurate with those of private riparian proprietors. They are analogous to those of persons and corporations on whom statutory powers have been conferred and statutory duties imposed. *Ponnusawmi Tevar* v. *Collector of Madura*, [(1869-70), 5 M.H.C.R., 6], referred to. *Krishna Ayyan* v. *Venkatachella Mudali*, [(1871-74), 7 M.H.C.R., 60], referred to. *Madras Railway Company* v. *Zemindar of Carvatenagarum*, [(1873-74), 1 I.A., 364], referred to. *Sankaravadivelu Pillai* v. *Secretary of State for India in Council*, [(1905), I.L.R., 28 Mad., 72], referred to. *First Assistant Collector of Nasik* v. *Shamji Dasrath Patil*, [(1883), I.L.R., 7 Bom., 209], referred to. This paramount of right of Government is recognised by the Legislature in section 7 (2) (*a*) of the Easement Act. It is independent of the ownership of the bed of the stream and exists alike whether the interest affected is that of ryotwari tenants or of the holders of proprietary estates. The right of riparian owners, recognised by section 7, ill. (h) of the Easement Act, to the flow water without interruption, is only a right to enjoy without *such interruption as will cause material damage*. As between riparian owners the law established in England is that diversion of water for riparian purposes is not actionable without proof of injury, but diversion for non-riparian purposes is actionable without proof of such injury. *Kensit* v. *Great Eastern Railway Company*, [(1883), 23 Ch.D., 566], referred to. *Bailey & Co.* v. *Clark, Son and Morland*, [(1902), 1 Ch., 649], referred to. *Debi Pershad Singh* v. *Joynath Singh*, [(1897), I.L.R., 24 Calc., 865], referred to. *Swindon Water-works Company* v. *Wilts and Berks Canal Navigation Company*, [L.R., 7 H.L., (E. & I.), 697], referred to. *McCartney* v. *Londonderry and Lough Swilly Railway*, [(1904), A.C., 301 at p. 313], referred to. In India, however, the Government by virtue of the paramount power vested in it as aforesaid will not be liable, in either case, without proof of damage. *Quære.*—Whether the American law of "appropriation," by which the upper riparian owner may divert water for non-riparian tenements provided the quantity so taken does not inflict perceptible injury on the lower riparian proprietor cannot, having regard to the climate and other circumstances in India, be applied to this country. *Belbhadur Pershad Singh* v. *Sheik Barkat Ali*, [(1906-07), 11 C.W.N., 85], referred to. An upper riparian proprietor is entitled to divert water, provided the amount diverted does not exceed the amount which he has himself, by artificial means, cut into the stream.

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WILL—*Execution of will—Evidence on the question of whether the testator was of sound disposing mind at time of execution—Reversal by Appellate Court of decision of Judge who heard evidence and entirely disbelieved their testimony—Onus of proof:*

On a contested application for probate in which the question was whether a testator was of sound disposing mind on two separate occasions when he was alleged to have executed a will and a codicil, the Judge who saw and heard the witnesses decided that the only reliable evidence was that of the doctor who attended the testator and attested the two documents, and that if the doctor's evidence was true, then that of the principal witnesses in support of the will could not be; and he therefore disbelieved their story as to the execution of the documents, and dismissed the application for probate. The Appellate Court being of opinion that he had not given adequate consideration to the possibility that, in spite of the testator's physical infirmity, his mental capacity was sufficient, reversed the decision and granted probate of the will and codicil:—*Held*, by the Judicial Committee (reversing the judgment of the Appellate Court), that the medical evidence entirely justified the view of the Judge who heard the evidence, namely, that it left the onus on the plaintiff who propounded the will quite undischarged, so that in the absence of other reliable evidence he had no alternative but to dismiss the application. It is always difficult for Judges who have not seen or heard the witnesses to refuse to adopt the conclusions of fact of those who have, but that difficulty is greatly aggravated when the Judge who heard them has formed the opinion not only that their inferences are unsound on the balance of probability against their story, but that they are not witnesses of the truth. *Coghlan* v. *Cumberland*, [(1898), L.R., 1 Ch., 705], referred to.

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WILL—SECRET TRUSTS—INDIAN TRUSTS ACT, ss. 5, 81—"*Attendant circumstances*" *under s.* 81, *what are—Admissibility of extrinsic circumstances to prove that legatee took as trustee or to prove resulting trust in favour of next of kin—Benamee, proof of, in case of wills governed by English Law:*

On the 19th April 1892, W.T. executed a will in the following terms:—This is the last will and testament of Mr. William Taylor, of Parlakimedi, Ganjam, India. I give, devise and bequeath unto S. S. S. Gourachandra Gajapati Narayana Deo, Zamindar of Parlakimedi, all that I may possess at the time of my death, including my property at Kodaikanal, and shares and other property in the Commercial Land Mortgage Bank, Madras, also books, furniture and other property moveable and immoveable and I appoint the said S. S. S. Gourachandra Gajapati Narayana Deo to be my sole executor. I have no doubt he will carry out my wishes. In witness whereof I, the said William Taylor, have to this, my last will and testament, set my name this 19th day of April one thousand eight hundred and ninety-two (1892). W.T. died in January 1902. Subsequent to his death, a letter written by him bearing date 28th April 1895 and addressed to the then zamindar of Parlakimedi (the legatee under the will) and containing an endorsement that it was to be opened after the death of W.T. was found. The letter directed the legatee to convert the testator's property into money and remit the proceeds to R.T., brother of W.T. The legatee proved the will and died in 1905 and this letter was not communicated in the life-time of W.T. In a suit brought by the next of kin of the testator for the administration of the estate against the son and heir of the legatee:—*Held per* Sir ARNOLD WHITE, C.J., and SANKARAN-NAIR, J.—That the letter of the 28th April 1895, not having been communicated in the testator's life-time did not operate to create a trust in favour of R.T., either under the rule of English Law or under section 5 of the Trusts Act. The legislature in enacting the proviso to section 5 of the Indian Trusts Act did not intend to depart from the English Law and the Court will impose a trust on a legatee only when there is fraud according to English Law. *Manuel Louis Kunha* v. *Jnana Coelho*, [(1908), I.L.R., 31 Mad., 187], referred to. *Per* Sir ARNOLD WHITE, C.J.—The letter is not admissible to show that the testator did not intend the legatee to take the interest which the will purported to give him. "Attendant circumstances" in

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section 81 of the Trusts Act means the same as surrounding circumstances and it is only when the latter can be considered for the purpose of ascertaining the intention of the testator under the English Law that evidence of an attendant circumstance can be given to show that the testator did not intend to dispose of the beneficial interest in property devised by will. Under the English Law the letter could not be looked at to show that the legatee under the will was not intended to take the beneficial interest and the Indian Law is the same. *In re Boyes, Boyes* v. *Carritt*, [(1884), 26 Ch.D., 531], distinguished. Where the "attendant circumstances" show an intention to dispose of the beneficial interest to any one, whether he is or not the legatee named in the will, there will be no resulting trust under section 81 of the Trust Act. The words "I have no doubt he will carry out my wishes" do not show that it was not the intention of the testator to dispose of the beneficial interest. In the case of wills executed by an English testator, the law of "benami" cannot be applied so as to override the provisions of the Trusts Act or the Succession Act or the English principles of equity on which these provisions are based. *Per* SANKARAN-NAIR, J.—The letter may be looked at for the purpose of determining whether the legatee was only a benamidar or trustee for some other person. It is also admissible to show that the legatee was only a trustee under section 81 of the Trust Act. An "attendant circumstance" under section 81 of the Trust Act, means a circumstance that accompanies or follows the transfer or bequest. The letter was intended to accompany or follow the will and may therefore be taken into consideration to discover the intentions of the testator. The letter must be read with the words of the will that the testator had no doubt that the legatee would carry out his wishes; and the two read together clearly show that the legatee was not intended to take any beneficial interest.

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